

**MULTIPLE FAMILIES, MULTIPLE GOALS, MULTIPLE  
FAILURES: THE NEED FOR “LIMITED  
EQUALIZATION” AS A THEORY  
OF CHILD SUPPORT**

ADRIENNE JENNINGS LOCKIE\*

TABLE OF CONTENTS

<i>I. Child Support Is Important to Families, Yet the Laws Fail to Reflect the Actual Composition of Families . . . . .</i>	112
<i>II. Child Support Is Highly Regulated by Federal Law, and Child Support Laws Perpetuate Race and Gender Stereotypes . . . . .</i>	117
<i>III. Federal Child Support Goals Ignore Multiple Families: A Focus on Child Support Laws and Legislative Histories, Strategic Plans, and Federal Oversight of State Child Support Guidelines . . . . .</i>	123
<i>IV. Critiquing Federal Involvement in Child Support: How Fiscal Savings, Children’s Economic Well-being, and Parental Involvement Fail as Goals . . . . .</i>	129
<i>V. State Child Support Guidelines Resolve Issues of Resource Allocation in Multiple Families Without Federal Guidance . . . . .</i>	139
<i>VI. Five New Goals of Child Support to Recognize Family Complexity . . . . .</i>	152

INTRODUCTION

Current child support laws are based on false assumptions about families that fail to reflect family complexity and the realities of parenting. The current model assumes a financially secure, heterosexual, married, cohabitating couple that separates without subsequently forming new unions or becoming parents again. This model — although almost always inaccurate —

---

\* Adrienne Jennings Lockie is a Practitioner-in-Residence at American University’s Washington College of Law where she teaches and supervises students in the Women and the Law Clinic. The author benefited tremendously from the critique, guidance, and insights of Ann Shalleck, Rick Wilson, Jenny Lyman, Diane Weinroth, Jane Stoever, Elliott Milstein, Dan Hatcher, Adam Zimmerman, Wendy Bach, Kate Bunker, Daniela Kraiem, Laura Rosenbury, and Josh Sarnoff. Adav Noti and Carolyn Lockie provided both editorial support and constant emotional support. The extensive research was supported by Lauren Harner, J.D., expected 2009. The author also thanks Kate Nielson and the staff of the *Harvard Journal of Law and Gender* for their superb editorial assistance.

is even more distanced from the realities of today.<sup>1</sup> In particular, child support laws ignore “multiple families” — families in which at least one parent has had another child with a different partner.<sup>2</sup> Consequently, federal child support laws fail to meet their self-described goals, and fail particularly acutely for poor families.<sup>3</sup> Because of this fundamental disconnect between child support laws and the realities of parenting, child support policy should be reenvisioned and a new theory of child support should be implemented. This Article proposes a new theory of child support, limited equalization, which makes an explicit policy choice in favor of existing families.

There has been little reevaluation of the stated goals of child support law since they were first implemented thirty years ago.<sup>4</sup> The stated goals — fiscal savings, children’s economic well-being, and parental involvement — have not been achieved and are increasingly unlikely to be achieved because they are based on flawed assumptions that do not reflect current family demographics. In particular, federal child support laws ignore the way that children in multiple families compete for the limited resources of their parents, leaving states without guidance for determining the support interests of children living in multiple families.

The two primary ways to allocate child support among families are “first family first” or “equalization.”<sup>5</sup> In “first family first” policy, the first

---

<sup>1</sup> See Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 911–12 (1984) (noting that disputes concerning disrupted families are resolved by applying the norms of nuclear families); Barbara Bennett Woodhouse, *“It All Depends on What You Mean by Home”: Toward a Communitarian Theory of the “Nontraditional” Family*, 1996 UTAH L. REV. 569, 570 (1996) (“Today, far from representing a radical fringe, nonnuclear families have become the norm for a generation.”); see also Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 550 (2001) (writing that “individual privacy rights are influenced by concern for promoting the interests of nuclear families”).

<sup>2</sup> In this Article, I use the terms multiple families, blended families, and complex families interchangeably. Typically, “multiple families” refers to families where one or both parents have had new children with other partners, often multiple new partners; “blended families” refers to families where one parent has acquired new parenting responsibilities as a result of a relationship with a new partner; and “complex families” refers to non-nuclear families, often with an extended parenting network. This Article focuses on families where at least one parent has a new child with a different partner. Although there may be differences in the family formation among complex, blended, and multiple families, the substantive and theoretical conclusions reached in this Article likely apply to all.

<sup>3</sup> See discussion *infra* Part IV.A.

<sup>4</sup> See discussion *infra* Parts II–III discussing the legislative histories and strategic plans that fail to reexamine the underlying principles of federal involvement in child support.

<sup>5</sup> Within this framework, children are characterized as existing children and subsequent children. “Existing children” are children to whom a support obligation is already owed; “subsequent children” are those born after the existing children; and the child in the first or earlier family is a “prior” child. See D.A. Rollie Thompson, *The Second Family Conundrum in Child Support*, 18 CAN. J. FAM. L. 227, 249 (2001).

family receives an award that is not reduced when new children are born.<sup>6</sup> The second way to allocate child support among families is through “equalization” policy, which calls for “equal treatment” of all the children of a particular parent.<sup>7</sup> This Article argues that the federal government should provide instructions on balancing these competing interests to ensure uniform policy goals and more consistent application of child support laws.

This Article examines who *should* bear the cost of a parent’s decision to have more children, particularly where there are limited resources, and develops a new theory of child support, limited equalization. Motivated by the current failures of federal involvement in child support, limited equalization gives states explicit guidance in developing child support guidelines while reenvisioning the focal points of child support policy.<sup>8</sup> Limited equalization recognizes modern demographics of families and expands upon the limited doctrines of duty of support and parenthood. It addresses the needs of children in low-income and multiple families and provides a mechanism to realistically account for families’ situations in calculating child support awards. When a choice must be made among multiple families, limited equalization favors first families because of the harmful effects of a reduction in child support.

Against the backdrop of these goals, limited equalization has five points of focus for child support: (1) making an explicit policy choice about supporting multiple families, with a preference for existing families; (2) recognizing the demographics of the families that need child support; (3) expanding the definition of parenting and the duty of support; (4) increasing attention to poverty prevention; and (5) increasing attention to gender equality.

Part I of this Article explains the importance of federal child support laws and their failure to account for modern demographics, Part II reviews the existing federal child support laws, Part III identifies the explicit goals of federal child support law, Part IV critiques the goals of federal child support law, and Part V examines issues of family complexity in state child support guidelines. Finally, Part VI identifies key issues in forming and implementing limited equalization as a new theory of child support.

---

<sup>6</sup> LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 3.04(a) (1996). The American Law Institute Principles also require the subtraction of prior child support obligations from the obligor’s income. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.14(3) (2000) [hereinafter ALI PRINCIPLES] (limiting the reduction to payments that are actually made). Judicial deference is ordinarily given to existing support orders for children born from prior relationships.

<sup>7</sup> Martha Minow, *How Should We Think About Child Support Obligations?*, in FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 302, 309 (Irwin Garfinkel, Sara S. McLanahan, Daniel R. Meyer & Judith A. Seltzer eds., 2001).

<sup>8</sup> Although many scholars have addressed the failures of child support policy, none have thoroughly examined multiple families or the relationship between family complexity and the goals of federal involvement in child support.

I. CHILD SUPPORT IS IMPORTANT TO FAMILIES, YET THE LAWS FAIL TO REFLECT THE ACTUAL COMPOSITION OF FAMILIES

A. *Child Support Laws Affect Millions of Families*

Along with welfare, child support is our legal system's primary mechanism to provide for children who do not reside with two parents. The child support system affects millions of families, including numerous complex families. In 2007, just under sixteen million cases and over seventeen million children were in the child support enforcement program.<sup>9</sup>

The structure of the American family has changed since the first federal child support laws were passed in 1974.<sup>10</sup> Many children are expected to live apart from "at least one biological parent, usually the father, before they reach the age of 18."<sup>11</sup> Numerous children are born to parents who are not married, and the number of single-parent families has steadily increased.<sup>12</sup> In the child support system, there are significant numbers of custodial parents who have never been married.<sup>13</sup> Having children with multiple partners is also increasingly common, particularly in unmarried families.<sup>14</sup> Families in the child support system also reflect this increasing complexity; for example, among Temporary Assistance to Needy Families ("TANF") cases in the

<sup>9</sup> OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP'T OF HEALTH AND HUMAN SERVS., CHILD SUPPORT ENFORCEMENT FY 2007 PRELIMINARY REPORT vi, viii (2008), available at [http://www.acf.hhs.gov/programs/cse/pubs/2008/preliminary\\_report\\_fy2007/Prelim2007.pdf](http://www.acf.hhs.gov/programs/cse/pubs/2008/preliminary_report_fy2007/Prelim2007.pdf).

<sup>10</sup> SUSAN D. STEWART, BRAVE NEW STEPFAMILIES: DIVERSE PATHS TOWARD STEPFAMILY LIVING 10–11 (2007) (discussing social and demographic trends that have changed the composition of stepfamilies, including that forty percent of unmarried cohabitating couples live with children).

<sup>11</sup> Anne C. Case, I-Fen Lin & Sara McLanahan, *Explaining Trends in Child Support: Economic, Demographic, and Policy Effects*, 40 DEMOGRAPHY 171, 171 (2003).

<sup>12</sup> One study suggests that almost forty percent of all births occur outside of marriage. Lawrence M. Berger, Marcia J. Carlson, Sharon H. Bzostek & Cynthia Osborne, *Parenting Practices of Resident Fathers: The Role of Marital and Biological Ties*, J. MARRIAGE & FAM. 625, 625 (2008). Over one-third of all births and two-thirds of black births are to unmarried mothers. Brady E. Hamilton, Joyce A. Martin, Stephanie J. Ventura, Paul D. Sutton & Fay Menacker, U.S. Dep't of Health and Human Servs., *Births: Preliminary Data for 2004*, 54 NAT'L VITAL STAT. REP. 1, 2 tbl.A (2005), [http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54\\_08.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_08.pdf).

<sup>13</sup> U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2005 3 (2007), available at <http://www.census.gov/prod/2007pubs/p60-234.pdf>. (indicating that one-third of custodial mothers in the sample population had never been married).

<sup>14</sup> See Kristin Harknett & Jean Knab, *More Kin, Less Support: Multipartnered Fertility and Perceived Support Among Mothers*, 69 J. MARRIAGE & FAM. 237, 237 (2007) (noting that in approximately thirty-five percent of births in urban areas, either the mother or father had a child with another partner); see also I-Fen Lin & Sara S. McLanahan, *Parental Beliefs about Nonresident Fathers' Obligations and Rights*, 69 J. MARRIAGE & FAM. 382, 382 (2007) (about fifty percent of children are expected to "experience father absence"); Daniel R. Meyer, Marcia Cancian & Steven T. Cook, *Multiple-Partner Fertility: Incidence and Implications for Child Support Policy*, 79 SOC. SERV. REV. 577, 581 (2005) (noting that "multiple fathers were more common as the number of children born to a mother increased").

child support system, one study found that half of mothers in a research group had children with multiple partners.<sup>15</sup> Stepparenting is also increasingly common, with one study suggesting that one-third of Americans are members of a stepfamily.<sup>16</sup> Same-sex partners are also increasingly raising children together: according to the 2000 Census, over ninety-five percent of U.S. counties have at least one same-sex couple with children under the age of eighteen.<sup>17</sup> These statistics demonstrate the decreasing prevalence of the two-parent heterosexual model and the rise in single-parent households, blended families, adoptive families, families headed by gays and lesbians, and extended families.<sup>18</sup>

The general failure of child support, nationwide, provides context for the particular failures that affect complex families. Child support awards have historically been inadequate and inconsistent.<sup>19</sup> For example, fewer

<sup>15</sup> EMMA CASPAR, UNIV. OF WISCONSIN—MADISON, REVIEW OF CHILD SUPPORT POLICIES FOR MULTIPLE FAMILY OBLIGATION: FIVE CASE STUDIES 1 (2006), available at <http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/Caspar-Task4A-2006.pdf> (citing MARIA CANCIAN & DANIEL R. MEYER, UNIV. OF WISCONSIN—MADISON, ALTERNATIVE APPROACHES TO CHILD SUPPORT POLICY IN THE CONTEXT OF MULTIPLE-PARTNER FERTILITY (2006)). At least twelve percent of children in the child support enforcement system receive TANF. Angela Ingram-Jones, *Child Support Population Demographics — Helping Point the Way*, *Child Support Report*, in 30 CHILD SUPPORT REPORT, OFFICE OF CHILD SUPPORT ENFORCEMENT 7 (2008).

<sup>16</sup> Margorie Engel, *Pockets of Poverty: The Second Wives Club — Examining the Financial [In]Security of Women in Remarriages*, 5 WM. & MARY J. WOMEN & L. 309, 313 (1999) (studying the effect of remarriage on women's financial situations); see also Larry L. Bumpass, R. Kelly Raley & James A. Sweet, *The Changing Character of Stepfamilies: Implications of Cohabitation and Nonmarital Childbearing*, 32 DEMOGRAPHY 425, 428 (1995) (suggesting that, considering cohabitation, about forty percent of all women and thirty percent of all children are likely to spend some time in a stepfamily); Lisa Doodson & David Morley, *Understanding the Roles of Non-Residential Stepmothers*, 45 J. DIVORCE & REMARRIAGE 109, 110 (2006) (suggesting thirty percent of the population and twenty to twenty-five percent of children live in stepfamilies).

<sup>17</sup> Urban Institute, *Gay and Lesbian Families in the Census: Couples with Children* (2003), [http://www.urban.org/UploadedPDF/900626\\_Checkpoints\\_Couples.pdf](http://www.urban.org/UploadedPDF/900626_Checkpoints_Couples.pdf).

<sup>18</sup> JUDITH STACEY, BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE TWENTIETH CENTURY AMERICA 262–268 (Basic Books 1990) (showing examples of blended families). Disagreement concerning what to do about the changes in the family is common. See, e.g., JYL J. JOSEPHSON, GENDER, FAMILIES, AND STATE: CHILD SUPPORT POLICY IN THE UNITED STATES 1–2 (1997) (indicating that ideology plays a role in these disagreements); Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 4 (arguing that the policy question that accompanies the shifting demographics and changing family should be “how we can support all individuals who create intimate, caring relationships, regardless of the form of those relationships”); Martha Minow, *All in the Family & in All Families: Membership, Loving and Owing*, 95 W. VA. L. REV. 275, 297 (1992–1993) (explaining that we have “choices about who should be treated as families”). Demographers examine family structure to see the extent to which it affects children. See, e.g., Marcia Carlson & Sara McLanahan, *Strengthening Unmarried Families: Could Enhancing Couple Relationships Also Improve Parenting?* 80 SOC. SERV. R. 297, 298 (2006); Berger, Carlson, Bzostek & Osborne, *supra* note 12, at 626; Margaret F. Brinig & Stephen L. Nock, *Legal Status and Effects on Children* 27 (Notre Dame Univ., Working Paper No. 07-21, 2007).

<sup>19</sup> See Margaret Campbell Haynes, *A Review of Child Support Guidelines: Interpretation and Application*, 31 FAM. L.Q. 133, 135–36 (1997) (book review) (noting that most noncustodial parents paid more in monthly car payments than in child support in 1978).

than fifty percent of nonresident fathers paid any formal support in any given year.<sup>20</sup> In 2005, of the nearly eight million custodial parents with child support awards, almost fifty-three percent of the parents were due outstanding support awards, though most had received some support in the past year.<sup>21</sup>

Although there is no national data on whether or how child support compliance differs for complex families, some studies suggest a higher rate of nonpayment. According to one study, “[n]onresident fathers with simple parenting obligations have 85% higher odds of paying child support than nonresident fathers with complex parenting obligations.”<sup>22</sup> Another study suggests that “the median percent of current support paid in the last year by obligors with multiple support orders was 36%, while it was 62% among obligors with one current support order.”<sup>23</sup> Although the causes and explanations for the trends may be difficult to measure, these studies nonetheless suggest that family complexity is correlated with lower rates of child support payment.<sup>24</sup>

*B. Child Support Laws Embody a Narrow Definition of “Family” that Fails to Reflect the Reality of Families*

Contemporary child support laws embody a narrow duty of support, a narrow definition of parenthood, and a misplaced focus on the dissolving nuclear family. All parents have a duty to support their minor children, which lasts until the child reaches the age of majority, dies, is emancipated, or the state terminates the parent-child relationship.<sup>25</sup> The duty to support children “stems from the parents’ literal responsibility for bringing the children into existence.”<sup>26</sup> Although child support is viewed as the right of the

---

<sup>20</sup> STEWART, *supra* note 10, at 114–15 (citing a survey that less than half of custodial mothers received child support and only sixty percent had a legal agreement regarding child support); *see also* THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS 40 (William S. Comanor ed., 2004) (suggesting the “collective goods” aspect of children helps to explain the existence of deadbeat dads who have incentives to shift the costs of children onto the mother).

<sup>21</sup> U.S. CENSUS BUREAU, *supra* note 13, at 7.

<sup>22</sup> Wendy D. Manning, Susan D. Stewart & Pamela J. Smock, *The Complexity of Fathers’ Parenting Responsibilities and Involvement with Nonresident Children*, 24 J. FAM. ISSUES 645, 659 (2003) (complexity of families results in less economic support).

<sup>23</sup> ELAINE SORENSON, LILIANA SOUSA & SIMON SCHANER, DEP’T OF HEALTH AND HUMAN SERVS., *Assessing Child Support Arrears in Nine Large States and the Nation* 66–67 (2007), available at <http://aspe.hhs.gov/hsp/07/assessing-CS-debt/report.pdf>.

<sup>24</sup> *See* Manning, Stewart & Smock, *supra* note 22, at 664 (noting the difficulty of accounting for all the factors influencing nonpayment but suggesting some solutions).

<sup>25</sup> ALI PRINCIPLES, *supra* note 6, § 3.03(2) (discussing the factors a court should consider in imposing an obligation).

<sup>26</sup> Minow, *supra* note 7, at 308. As Minow notes, this rationale does not give any insight into the scope of the obligation, either in how much support or under what circumstances it should be adjusted. *Id.* at 320; *see also* Ira Mark Ellman, *Thinking about Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 71 (2002) (explaining current child support laws in terms of normative assumptions about the duties

child, it is usually paid to a parent.<sup>27</sup> Only in extremely limited circumstances will the support obligation extend to non-parents. Grandparents do not ordinarily have a child support obligation for their grandchildren but may be ordered to pay support if acting in loco parentis.<sup>28</sup> Child support obligations for same-sex parents vary depending on the state and may be afforded under several theories.<sup>29</sup> Stepparents and their stepchildren are ordinarily “legal strangers to each other,” but some states include stepparents in their support statute.<sup>30</sup>

In addition to this narrow duty of support, parenthood is also narrowly defined as an “exclusive status” in which a child can have only one set of parents.<sup>31</sup> Several doctrines have been used to expand parenting beyond bio-

---

that arise from biological parenthood); cf. Scott Altman, *A Theory of Child Support*, 17 INT'L J.L. POL'Y & FAM. 173, 179–80 (2003) (critiquing a theory of consent as a justification for child support payments).

<sup>27</sup> For an argument in favor of allowing adult children to seek retroactive child support, see Lani P. Shaw, *Show Me the Money!: Analyzing an Adult Child's Standing to Recover Retroactive Child Support Payments*, 48 HOW. L.J. 1053, 1055 (2005).

<sup>28</sup> Laura W. Morgan, *Child Support Obligations of Grandchildren* (1999), <http://www.childsupportguidelines.com/articles/art199910.html> (discussing relevant statutes and case law). For a definition of in loco parentis, see *infra* note 34.

<sup>29</sup> See, e.g., Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L.Q. 23, 42–49 (2006) (discussing cases from multiple states and various theories by which same-sex coparents can achieve full recognition); Maggie Manternach, *Where is My Other Mommy?: Applying the Presumed Father Provision of the Uniform Parentage Act to Recognize the Rights of Lesbian Mothers and Their Children*, 9 J. GENDER RACE & JUST. 385, 387 (2005) (discussing the possibility of using the Uniform Parentage Act to obtain legal recognition). See generally Caroline P. Blair, *It's More Than a One-Night Stand: Why a Promise to Parent Should Obligate a Former Lesbian Partner to Pay Child Support in the Absence of a Statutory Requirement*, 39 SUFFOLK U. L. REV. 465, 467 (2006); Sara R. David, *Turning Parental Rights Into Parental Obligations — Holding Same-Sex, Non-Biological Parents Responsible for Child Support*, 39 NEW ENG. L. REV. 921, 934–35 (2005); Nancy Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 MONT. L. REV. 51, 57–58 (2005) (surveying developments).

<sup>30</sup> MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 1, 4, 10. (1994); see ALI PRINCIPLES, *supra* note 6, § 3.03 cmt. B, illus. 2; see also Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 40 (1984) (arguing for more comprehensive laws that establish “certainty and protection” for stepfamily members); Martha Minow, *Redefining Families: Who's In and Who's Out*, 62 U. COLO. L. REV. 269, 283–84 (using the stepparent relationship as an example of the tensions inherent in government regulation of relationships); Laura W. Morgan, *Positive Parenting and Negative Contributions: Why Payment of Child Support Should Not be Regarded as Dissipation of Marital Assets*, 30 N.M. L. REV. 1, 3–10 (2000) (outlining how child support law favors the timely payment of child support to children from prior relationships when considering support payments to be made to a child born of a marriage).

<sup>31</sup> See Bartlett, *supra* note 1, at 886–93 (tracing the concept of parenthood as an exclusive status to the traditions of natural law and instrumentalism). However, stepparent income may be considered in some contexts even where the stepparent has no legal support obligation. See, e.g., U.S. Dep't of Educ., *Free Application for Federal Student Aid* (2008), <http://www.fafsa.ed.gov/> (taking into account stepparent income when calculating eligibility for and amount of federal student aid).

logical ties for purposes of child support, including de facto parenting,<sup>32</sup> equitable estoppel,<sup>33</sup> in loco parentis,<sup>34</sup> and through contract.<sup>35</sup> Even these doctrines, however, limit the number of parents that a child may have.<sup>36</sup> Many of these doctrines rely on outdated views on the prevalence of the nuclear family.<sup>37</sup> Current family laws do not contemplate the reality of overlapping families.<sup>38</sup> Current child support laws presuppose a heterosexual, typically married (but always cohabitating) family that permanently dis-

---

<sup>32</sup> See ALI PRINCIPLES, *supra* note 6, § 2.03(1)(c) (defining a de facto parent in terms of the amount of caretaking functions performed).

<sup>33</sup> See *id.* Estoppel may prohibit non-biological parents from disclaiming their responsibilities where they have been involved in a child's life. *Id.*

<sup>34</sup> The legal doctrine in loco parentis, Latin for "in place of parents," may apply where "an adult informally assumes custodial responsibility for a child." MAHONEY, *supra* note 30, at 7. Because the rights and obligations are created voluntarily, they are terminable at will. See *id.* at 18, 21.

<sup>35</sup> Contracts arise most frequently in the surrogacy context. *Id.* at 27–28; see also Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J.L. & FAM. STUD. 1, 53–64 (2003) (discussing the use of pre-conception declarations, particularly where assisted reproductive technology is used); Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 643–59 (2005) (surveying various state approaches to surrogacy contracts). A full discussion of surrogacy and contracting for parenting rights is outside the scope of this article.

<sup>36</sup> See June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1013 (2003) (criticizing current doctrine because, from the standpoint of the children, parental relationships should "be based on truth and certainty rather than convenience or presumptions — or even biology"). But see Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 686 (2001) (arguing that "biologically-based legal construction of parenthood is actually a progressive tool for protecting the integrity of those families who do not easily fit the dominant norms of family"). Although there should probably be some limit to the number of parents a child may have, further discussion of that point is outside the scope of this article.

<sup>37</sup> See June Carbone, *The Legal Definition of Parenthood*, 65 LA. L. REV. 1295, 1341–43 (2005) (arguing that parental rights need to be "unbundled"); Karen Syma Czapanskiy, *To Protect and Defend: Assigning Parental Rights When Parents and Living in Poverty*, 14 WM. & MARY BILL RTS. J. 943, 943 (exploring the interdependence of interests between the child and birth mother and suggesting that the mother should have the ability to designate another partner); Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 UCLA L. REV. 637, 643 (1993) (describing how reproductive technologies are challenging assumptions about exclusivity); Matthew M. Kavanaugh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 94 (2004) (arguing that exclusive parental agreements ignore that families often have more than one non-biological caregiver); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 469 (1990) (suggesting self-designation).

<sup>38</sup> Allison Harrison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 506 (1998); see also Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 821, 852–56 (2006) (indicating that family law is moving in a paradoxical direction because "courts and legislatures are embracing alternatives to biological parenthood" even as biology alone frequently establishes parentage).

solves.<sup>39</sup> Expanding the definition of parenthood even further would better serve the interests of children and parents in all family arrangements.<sup>40</sup>

This Article has also been informed by my experience supervising student attorneys at the Washington College of Law who represent women in child support matters. Our clients' lives rarely embody the dominant paradigm, and the goals of child support are rarely accomplished as applied to real people. Many of our clients would benefit from an approach that expressly considered the needs of multiple families and incorporated an expanded definition of the duty of support. The dissonance between the legal structure and the lives of those seeking to use it undermines the idealized vision of child support implicit in the current laws.

Because the creation of new families may lead to a reassessment of child support responsibility, we should examine the implementation of child support guidelines in complex families. Is there a cost to having subsequent families? Who bears it? What choices do states make when low-income parents do not have enough income to provide for all of their children? Where there are limited resources, who should bear the cost of a parent's decision to have more children?<sup>41</sup> Because these normative questions implicate regulatory issues, it is important to understand how federal law influences the state agencies that implement child support laws.

## II. CHILD SUPPORT IS HIGHLY REGULATED BY FEDERAL LAW, AND CHILD SUPPORT LAWS PERPETUATE RACE AND GENDER STEREOTYPES

Child support is regulated largely by federal law.<sup>42</sup> Federal laws govern the implementation of child support policy at the state level.<sup>43</sup> Despite the

---

<sup>39</sup> See Carbone & Cahn, *supra* note 36, at 1013 (criticizing current doctrine as based on presumptions about biological parentage); JOSEPHSON, *supra* note 18, at 133 (explaining that changes in welfare policy have tended to reinforce traditional assumptions about families).

<sup>40</sup> See Bartlett, *supra* note 1, at 944–48 (discussing alternatives to an exclusive definition of parenthood to better serve the child's interests); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 361 (1994) (arguing that children have an independent liberty interest in familial relationships and the definitions of family are too "adult-centered").

<sup>41</sup> See MORGAN, *supra* note 6, § 3.04(a).

<sup>42</sup> For a description of federal legislation and regulations, see MORGAN, *supra* note 6, ch. 1, and Laura W. Morgan, *Child Support Enforcement in the United States and the Role of the Private Bar* (2000), <http://www.childsupportguidelines.com/articles/art200009.html>; see also Michelle Jo Beld & Len Biernat, *Federal Intent for the State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 FAM. L.Q. 165, 166 (2003) (arguing that what is most important in child support is what is *not* regulated by federal law, as seen in the variety of state guidelines and factors considered); Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695, 697 (explaining the "federalization" of child support).

<sup>43</sup> States regulate child support through child support guideline statutes. See *infra* notes 48–49 and accompanying text.

considerable guidance that federal laws and regulations provide to the states, nowhere do federal laws or regulations address the particular concerns of multiple families.<sup>44</sup>

The first major federal intervention in child support began in 1974 as a component of welfare legislation, creating the “IV-D” system.<sup>45</sup> The Family Support Act, Title IV-D of the Social Security Act, requires states that receive Aid to Families with Dependent Children (“AFDC”) funds to enforce child support obligations.<sup>46</sup> The current IV-D statute governing federal child support specifies that the purpose of the federal child support law is the following:

enforcing the support obligations owed by noncustodial parents to their children and the spouse (or former spouse) with whom such children are living, locating noncustodial parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for assistance under a State program funded under part A of this subchapter).<sup>47</sup>

Following the passage of the Family Support Act of 1974, the Child Support Enforcement Act of 1984 mandated that each state develop guidelines to serve, at minimum, an advisory role in support calculations.<sup>48</sup> This Act was followed by the Family Support Act of 1988, which required all states to enact guidelines and required that the amount derived from guideline calculations be presumptive, rather than advisory.<sup>49</sup> Subsequent federal child support laws included the Child Support Recovery Act of 1992

<sup>44</sup> See 45 C.F.R. § 302 (2008) (describing state plan requirements). Federal regulations require that states have guidelines with a rebuttable presumption that they apply and take into consideration the earnings and incomes of the noncustodial parent. See *id.* § 302.56. Departures from the state guidelines must be justified by written findings and should include a consideration of the best interest of the child. See *id.* § 302.56(g).

<sup>45</sup> See Family Support Act, Title IV-D of the Social Security Act of 1974, Pub. L. No. 93-647, 88 Stat. 2351 (1975) (codified at 42 U.S.C. §§ 651–660). The term “IV-D” is the name for the child support enforcement programs administered by the government, and comes from Title IV-D of the Social Security Act. A child support case is typically considered “IV-D” if the family has received welfare assistance.

<sup>46</sup> 42 U.S.C.A. § 651 (2008).

<sup>47</sup> *Id.*

<sup>48</sup> Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 18(a), 98 Stat. 1305, 1321 (codified as amended at 42 U.S.C. § 667 (2000)) (requiring guidelines). This Act amended Part D of Title IV of the Social Security Act, but it applies to non-IV-D families as well. The primary purpose is to ensure payment through increased enforcement procedures, such as by requiring wage-withholding and including tax refund intercepts. *Id.*

<sup>49</sup> The Family Support Act of 1988, Pub. L. No. 100-485, § 103, 102 Stat. 2343, 2346 (codified at 42 U.S.C. § 667 (2000)), requires the state guidelines to apply with a rebuttable presumption and requires states to review their guidelines every four years. Additionally, the implementing federal regulations, 45 C.F.R. § 302.56 (2007), require states to use economic data on child-rearing costs. See Beld & Biernat, *supra* note 42, at 173. Presumptive guidelines were thought to increase initial orders and the equity of orders. *Id.* at 1–4, 6–7. As a result of the 1988 law, all states have child support guidelines,

(“CSRA”),<sup>50</sup> the Full Faith and Credit for Child Support Orders Act, enacted in 1994,<sup>51</sup> and the Child Support Performance and Incentive Act of 1998.<sup>52</sup>

The Federal Child Support Enforcement Program is administered through the Administration for Children and Families (“ACF”) of the Department of Health and Human Services.<sup>53</sup> Each state has a child support enforcement agency, which can assist a parent in locating the other parent, establishing paternity, and establishing, enforcing, modifying, and collecting support.<sup>54</sup> Although the enforcement of child support payments has two tracks — private enforcement or state enforcement — state enforcement is available to all parents, not only welfare recipients.<sup>55</sup>

The most significant change to child support laws came with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”).<sup>56</sup> In addition to radically altering welfare, PRWORA revised rules governing the distribution of child support collection among federal and state governments and welfare families, required states to establish an automated registry of all child support cases and a directory of new hires, and required states to provide information to a federal parent locator service.<sup>57</sup> PRWORA also enhanced interstate enforcement and required states

---

typically tables, which set formulas or amounts to calculate child support payments. MORGAN, *supra* note 6, § 1.02(d).

<sup>50</sup> Pub. L. No. 102-521, § 2(a), 106 Stat. 3403, 3403 (1992) (codified as amended at 18 U.S.C. § 228 (2000)) (imposing a criminal penalty for failure to pay child support arrears where the child lives in another state).

<sup>51</sup> Pub. L. No. 103-383, 108 Stat. 4063 (1994) (codified as amended at 28 U.S.C. § 1738(B) (2000)) (establishing national standards for state courts to determine whether they have jurisdiction to issue child support orders and how to treat child support orders issued by courts in other states; penalizing states that fail to meet the federal child support data processing requirements).

<sup>52</sup> Pub. L. No. 105-200, § 401, 112 Stat. 645 (1998) (codified as amended in scattered sections of 29 and 42 U.S.C.) (giving financial incentives to states for child support collection and performance).

<sup>53</sup> 45 C.F.R. §§ 301–307 (2008) (implementing provisions of Title IV-D of the Social Security Act).

<sup>54</sup> *See id.*

<sup>55</sup> Private enforcement refers to parents who hire a private attorney to represent the parent in a child support matter. *See* Barabara Glasner Fines, *From Representing “Clients” to Serving “Recipients”: Transforming the Role of IV-D Child Support Enforcement Attorney*, 67 FORDHAM L. REV. 2155, 2156–57 (1999) (noting private enforcement is less common than relying on state enforcement); *see also* Laura W. Morgan, *Private Attorney Access to Child Support Enforcement Tools in the Recommendations of the U.S. Commission on Interstate Child Support* (2002), <http://www.supportguidelines.com/articles/art200203.html> (suggesting that private enforcement may be less effective because private attorneys do not have access to the same information and enforcement tools as state agencies). The possibility of state enforcement is codified at 42 U.S.C. § 657(a)(2)(B)(i)(II)(aa) (Supp II 1996). Any parent, not just those on welfare, may request state enforcement, making this a unique program in which parents with income may choose to “opt into the system.” Fines, *supra*, at 2165 (citations omitted).

<sup>56</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.). This Act is explicit in its goals of promoting marriage, “responsible fatherhood and motherhood,” and preventing “out-of-wedlock” pregnancies. *Id.* § 101.

<sup>57</sup> *Id.* §§ 315–316.

to adopt the Uniform Interstate Family Support Act (“UIFSA”).<sup>58</sup> It requires all welfare recipients to cooperate with state enforcement of child support orders and to assign their child support rights to the state.<sup>59</sup>

Child support and welfare have been explicitly linked because federal involvement in child support began as part of the AFDC program.<sup>60</sup> Child support and welfare are also related because parents who receive child support may not need to depend on the government for welfare. Perhaps not surprisingly then, the problem of welfare dependency has influenced policy decisions in the child support arena.<sup>61</sup> Similarly, because federal child support involvement began as a part of AFDC, child support laws reflect the same gender, race, and class biases that have historically plagued welfare.<sup>62</sup> Specifically, single mothers are demonized in child support policies because they are blamed for their dependency, either on child support or on welfare.<sup>63</sup> Mothers on welfare who have children with multiple partners are especially stigmatized.<sup>64</sup> As welfare laws and policies have demonized poor parents,

<sup>58</sup> The UIFSA essentially binds litigants to the child support determination made by the original forum. UIFSA §§ 101–905, 9 U.L.A. 171 (2001). For example, under § 604(a), “the law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrearages under the order.”

<sup>59</sup> PRWORA § 333. The assignment provision is 45 C.F.R. § 302.50 (2008) (requiring states to implement assignment of rights to support), which existed prior to PRWORA. For an overview of the assignment process, see Vicki Turetsky, *What if All the Money Came Home? Welfare Cost Recovery in the Child Support Program*, 43 FAM. CT. REV. 402, 405–07 (2005).

<sup>60</sup> See Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 232–36 (2000) (noting that welfare law reform has allowed the government to regulate familial relationships and that “family law” and “welfare law” serve overlapping functions); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 893 (2004) (using PRWORA to illustrate the relationship between welfare and family law).

<sup>61</sup> Brito, *supra* note 60, at 250–52 (suggesting that family law subjects poor single mothers to differential treatment and that recent reforms in child support demonstrate the “welfarization” of family law); see also Stacy L. Brustin, *The Intersection Between Welfare Reform and Child Support Enforcement: D.C.’s Weak Link*, 52 CATH. U. L. REV. 621, 627–31 (2003) (discussing enactment of welfare reform and its implications for child support).

<sup>62</sup> See JOSEPHSON, *supra* note 18, at 133 (explaining that changes in welfare policy have tended to reinforce gender, race, and class divisions); Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 970 (1997) (stating that welfare has a race and gender component in its public perception, historical basis, and current demographics of recipients).

<sup>63</sup> Martha Albertson Fineman, *Preface* to *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD*, at ix (Fineman & Isabel Karpin eds., 1995) (describing how society stigmatizes single parents as bad parents with incomplete and dysfunctional families, which results in bad consequences for their children).

<sup>64</sup> See Rose Ernst, *Localizing the “Welfare Queen” Ten Years Later: Race, Gender, Place, and Welfare Rights*, 11 J. GENDER RACE & JUST. 181, 185 (2008) (characterizing “laziness” and “hyperfertility” as the core traits of the “welfare queen” stereotype, without specific reference to multiple fathers); Wendy A. Bach, *Welfare Reform, Privatization and Power: Reconfiguring Administrative Law Structures from the Ground Up*, 74 BROOKLYN L. REV. (forthcoming Nov. 2008) (manuscript at 44), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1287743](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287743) (citing scholarship discussing the history of welfare policy’s contribution to gender and race subordination).

child support laws carry on welfare law's demonizing traditions in regulating families. The negative stereotypes of women on welfare, particularly women of color, carry over to single mothers seeking child support.<sup>65</sup>

For all parents in the child support system, hidden assumptions about family are embedded in the gender-neutral child support laws: child support policy contains assumptions about motherhood<sup>66</sup> and fatherhood,<sup>67</sup> which often differ based on race.<sup>68</sup> One attitude implicit in current child support policy is that single motherhood is a problem that needs to be "fixed" by marriage.<sup>69</sup> Fathers are frequently portrayed as deadbeats whose only value as a parent is economic.<sup>70</sup> Child support enforcement policies punish women

<sup>65</sup> See Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 433 (1999) (discussing welfare's shift toward compulsory labor force participation and that the legal images of women on welfare have changed over time, with a focus away from valuing mothering); see also Jyl Josephson, *The Intersectionality of Domestic Violence and Welfare in the Lives of Poor Women*, in DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE 83, 88 (Natalie Sokoloff ed., 2005) (indicating that welfare policy distinguishes between deserving and undeserving poor and controls recipients by requiring specific behaviors). The welfare state is also being used to discipline poor men. JOSEPHSON, *supra* note 18, at 138.

<sup>66</sup> Fineman, *supra* note 63, at xi.

<sup>67</sup> Because fatherhood is biologically harder to determine than motherhood, the study of fatherhood and the ideology surrounding it has generated much scholarship. See generally Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 233–34 (2006); Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 135–37 (2003); Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 472–73; Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 941 (2005); Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 48 (2004).

<sup>68</sup> See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, in MOTHERS IN LAW, *supra* note 63, at 225–27 (exploring "how racism and patriarchy interact in the social construction of motherhood"); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 210 (1995) (demonstrating that the role of the genetic tie is indeterminate and designed to promote racist and patriarchal norms); see also June Carbone, *Morality, Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267, 349 (1996) (describing how slavery profoundly shaped marriage and, consequently, child support); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 36–37, 47 (1995) (stating that "the intersection of race and gender generates powerful stereotypes about black women" as single mothers); Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 FAM. L.Q. 461, 472 (1999) (noting that society discourages the birth of children to black families while simultaneously providing the opportunity for more white families to have children through adoption and reproductive technologies).

<sup>69</sup> Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1672 (2005) (describing the shift in the image of the welfare mother from "a deserving white widow to a black single mother").

<sup>70</sup> Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 994, 1012 (2006) (explaining that the law has constructed the concept of fatherhood as merely the payment of child support and thus too narrowly).

by “simultaneously offer[ing] women access to resources while reinscribing traditional gender roles.”<sup>71</sup> Martha Minow has suggested that contemporary debates about child support and welfare reform are targeted attacks on women who fail to conform to expected roles.<sup>72</sup>

Child support laws implicitly assume a particular vision of the family: mothers are the custodial parents and fathers are the child support obligors. Although child support laws have become gender-neutral over time,<sup>73</sup> they still enforce gender roles by calling for the return of fathers<sup>74</sup> and, through welfare assignment, regulate the behavior of mothers.<sup>75</sup> At the same time, the reality of child support is highly gendered: most recipients of child support are mothers while most obligors are fathers.<sup>76</sup> According to a recent demographic survey sponsored by the Office of Child Support Enforcement (“OCSE”), close to ninety-five percent of custodial parents in the child support system are mothers.<sup>77</sup> Moreover, the current failures of child support may not receive the attention they deserve because the responsibility for child care is typically seen as the duty of mothers.<sup>78</sup>

While perpetuating stereotypes based on race and gender, none of these federal child support laws — from 1974 until the present — explicitly ad-

<sup>71</sup> JOSEPHSON, *supra* note 18, at 128; *see also* Martha Albertson Fineman, *Child Support is Not the Answer: The Nature of Dependencies and Welfare Reform*, in *CHILD SUPPORT: THE NEXT FRONTIER* 209, 210–11 (J. Thomas Oldham & Marygold S. Melli eds., 2000) (indicating that government preferences like tax breaks serve as a form of welfare assistance for everyone, but that only traditional nuclear families receive “unstigmatized assistance”).

<sup>72</sup> *See* Minow, *supra* note 30, at 281 (noting that child support enforcement can be used to benefit the state while punishing individuals).

<sup>73</sup> For example, the 1988 Senate Report states that “the problem of nonsupport of children by their parents has become a serious one for this country. Nearly one-quarter of all children now live with only one parent. And although many noncustodial parents are diligent payers of child support, there are millions who are not.” S. REP. NO. 100-377, at 8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2776, 2785. The 1988 Report briefly mentions “mothers” and “fathers,” noting that “fewer than one in five mothers who had never been married had been awarded support.” *Id.*

<sup>74</sup> For example, the 1974 Senate Report states that “[t]he problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parent.” S. REP. NO. 93-1356, at 42 (1974), *reprinted in* 1974 U.S.C.C.A.N. 8133, 8145.

<sup>75</sup> *See* ANN MARIE SMITH, *WELFARE REFORM AND SEXUAL REGULATION* 3 (2007) (stating that “the poor single mother who receives TANF benefits must name the biological father of her children and assist the state in collecting support payments from him”).

<sup>76</sup> *See, e.g.*, D.C. CHILD SUPPORT GUIDELINE COMMISSION, *REPORT OF THE DISTRICT OF COLUMBIA CHILD SUPPORT GUIDELINE COMMISSION* pt. II, ch. 4, at 4–5 (2004), *available at* <http://csed.dc.gov/csed/cwp/view,a,3,q,588962,pm,1,csedNav,%7C31158%7C.asp> (finding that the petitioner for support was the mother in ninety-six percent of cases).

<sup>77</sup> ELAINE SORENSON & TESS TANNEHILL, *DEPT OF HEALTH AND HUMAN SERVS., DEMOGRAPHIC SURVEY RESULTS FROM NINE STATE IV-D PROGRAMS* (2007) (on file with Harvard Law School Library).

<sup>78</sup> Mothers are often presumed to be the primary caretakers of young children, as evidenced by the long-held “tender years presumption” in family law doctrine (the judicial presumption that mothers are more connected to young children). *See* Julie E. Arties, *Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 L. & SOC’Y REV. 769, 770 (2004).

dress family complexity.<sup>79</sup> Throughout the existence of federal child support laws, enforcement programs, and welfare laws, the federal government has remained silent on the issue of multiple families. The new theory of limited equalization seeks to remedy this problem in federal and state child support regimes.

### III. FEDERAL CHILD SUPPORT GOALS IGNORE MULTIPLE FAMILIES: A FOCUS ON CHILD SUPPORT LAWS AND LEGISLATIVE HISTORIES, STRATEGIC PLANS, AND FEDERAL OVERSIGHT OF STATE CHILD SUPPORT GUIDELINES

Federal child support goals are important because they drive the implementation of child support laws. Federal child support laws are based on three explicit goals, none of which address the needs of complex families or give guidance on how to allocate limited resources for low-income multiple families.<sup>80</sup> The three stated goals of federal involvement in child support are (1) fiscal savings, (2) children's economic well-being, and (3) public enforcement of parental responsibility.<sup>81</sup> These goals, particularly the focus on fiscal savings, are well-documented: they are stated in the child support laws and corresponding legislative histories,<sup>82</sup> in the strategic plans of the federal child support agency,<sup>83</sup> and in federal oversight of state child support guidelines.<sup>84</sup>

#### A. *Federal Child Support Goals Stated in Federal Laws and Legislative Histories Ignore Multiple Families*

The goals of fiscal savings and economic well-being were discussed in the 1974 Family Support Act.<sup>85</sup> The legislative history of the 1974 Act ex-

---

<sup>79</sup> The one exception is that PRWORA addresses multiple families in the context of reducing benefits and defining who counts for the purpose of benefits. See Pub. L. No. 104-193, sec. 103(a)(1), § 402(a)(7)(A)(iii), 110 Stat. 2105, 2113 (1996) (codified as amended at 42 U.S.C. § 602 (2000)). Although TANF does not *require* a "family cap" (denying additional financial assistance to mothers who have children while receiving welfare), it *permits* states to deny additional assistance. See National Conference of State Legislators, Family Cap Policies, <http://www.ncsl.org/statefed/welfare/familycap05.htm> (last visited Nov. 21, 2008).

<sup>80</sup> These three goals, in conjunction with all of the child support laws, make up what I call "child support policy."

<sup>81</sup> JOSEPHSON, *supra* note 18, at 43–45 (describing documentation of the three goals and noting that "[t]he clearest norm . . . is the emphasis on the financial responsibility of legal parents").

<sup>82</sup> See *supra* notes 45–52 and accompanying text (discussing child support laws, the most notable of which were passed in 1974, 1984, 1988, 1992, and 1994); see also ALI PRINCIPLES, *supra* note 6, § 3.04 cmt. b (describing the "societal interests in protecting the public purse and ensuring adequate investment in children").

<sup>83</sup> See *infra* Part III.B.

<sup>84</sup> See *infra* Part III.C.

<sup>85</sup> Social Services Amendments of 1974, Pub. L. No. 93-647, pt. A, sec. 2, § 2001(1), 88 Stat. 2337 (1975) (codified as amended at 42 U.S.C. § 1397 (2000)).

pressly tied these two goals to increased parental responsibility by blaming the problem of non-support on absent fathers.<sup>86</sup> Although the child support laws were expanded in 1984 to cover families not receiving welfare,<sup>87</sup> legislators continued to characterize the problem as one of absent parents and single-parent homes.<sup>88</sup> Additionally, increased paternity establishment has been an element of child support laws since their inception.<sup>89</sup> The overarching goals of fiscal savings, children's economic well-being, and parental responsibility continued to influence federal child support legislation in the 1980s.<sup>90</sup>

The PRWORA promoted fiscal savings, economic well-being, and parental responsibility.<sup>91</sup> However, while the PRWORA characterizes the demographic shifts as a "crisis," it virtually ignores multiple families.<sup>92</sup> For example, Congress observed that individuals receiving assistance had tripled since 1965 and "[e]ighty-nine percent of the children receiving AFDC benefits now live in homes in which no father is present."<sup>93</sup> The findings also state that "[t]he increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women,"<sup>94</sup> and claim that the "negative consequences of an out-of-wedlock birth on the mother, the child, the family, and society" are well-documented.<sup>95</sup> Although the findings refer to single-parent homes, there is no mention of multiple families. Although the PRWORA requires welfare recipients to cooperate

<sup>86</sup> See *supra* note 74.

<sup>87</sup> Child Support Enforcement Amendment Act of 1984, Pub. L. No. 98-378, sec. 2, 98 Stat. 1305, 1305-06.

<sup>88</sup> For example, the Child Support Enforcement Amendment Act of 1984 included findings about the "alarming" divorce rate and increasing number of children raised in single parent families. *Id.* sec. 23; see also S. REP. NO. 98-387, at 22-30 (1984), reprinted in 1984 U.S.C.C.A.N. 2397, 2418-26 (1984) (clarifying the expanded role of the federal government and the procedures states can use to enhance enforcement).

<sup>89</sup> S. REP. NO. 93-1356, at 51 (1974), reprinted in 1974 U.S.C.C.A.N. 8133, 8146 (noting the Committee's concern "that all children have the right to receive support from their fathers . . . including the right to have their fathers identified so that support can be obtained"). The emphasis on paternity establishment is also designed to enhance the financial and emotional well-being of children by providing children a link to their absent fathers. See JOSEPHSON, *supra* note 18, at 36.

<sup>90</sup> The stated purpose of the Family Support Act of 1988 was to "revise the AFDC program to emphasize work, child support, and family benefits . . . and to encourage and assist needy children and parents under the new program to obtain the education, training, and employment to avoid long-term welfare dependence." Family Support Act of 1988, Pub. L. No. 100-485, pmb. 102 Stat. 2343 (1988). The 1988 Senate Report states that the purpose is to stress "family responsibility" in the "context of the vastly changed family arrangements of the intervening half century." S. REP. NO. 100-377, at 14-15 (1988), reprinted in 1988 U.S.C.C.A.N. 2776, 2791-92. The Report emphasized "child support enforcement and job training as the primary means of avoiding long-term welfare dependence." *Id.* at 15.

<sup>91</sup> PRWORA, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>92</sup> *Id.* § 101(10). Rather than changing policies to include multiple families, the PRWORA proposed changes to prevent out-of-wedlock birth and pregnancy. *Id.*

<sup>93</sup> *Id.* § 101(5).

<sup>94</sup> *Id.* § 101(5)(C).

<sup>95</sup> *Id.* § 101(8).

with “establishing paternity . . . or in . . . establishing, modifying, or enforcing a support order,” the statute does not explain or give guidance on how to establish, modify, or enforce support orders where there are multiple families.<sup>96</sup> The legislative history of the PRWORA confirms that one goal was to reduce the number of women receiving welfare by replacing welfare with privately paid child support.<sup>97</sup> Nevertheless, the legislative history is silent on the challenges multiple families present to accomplishing the goal of fiscal savings.

The current IV-D statute continues to prioritize the role of state enforcement in order to limit fiscal spending on child support. The current statute and regulations provide extensive state plan requirements,<sup>98</sup> including requiring assignment of rights to support for welfare recipients<sup>99</sup> and regulating state child support guidelines.<sup>100</sup> None of the current stated goals specifically addresses family complexity.

### *B. Federal Child Support Goals Stated in the Federal Strategic Plans Ignore Multiple Families*

Public documents created by the OCSE state that the primary goal of federal child support policy is fiscal savings.<sup>101</sup> The strategic plans largely ignore the role of multiple families, even with regard to the goal of fiscal savings. According to the OCSE, the mission of the Child Support Enforcement Program is to “enhance the well-being of children by assuring that assistance in obtaining support, including financial and medical, is available to children through locating parents, establishing paternity, establishing support obligations, and monitoring and enforcing those obligations.”<sup>102</sup> Although the most recent National Child Support Enforcement Strategic Plan (“Strategic Plan”) prepared by the OCSE states that child support is “no

---

<sup>96</sup> *Id.* § 333.

<sup>97</sup> House reports for the PRWORA openly express the link between welfare reform, child support, and state fiscal savings, as demonstrated in the following report which contains the following explanation for getting “tough” on child support enforcement:

The committee believes it is irresponsible for Federal benefits to be available to parents (and, at State option, families) that do not cooperate in attempting to obtain proper child support. In thousands of cases, if child support were collected as ordered, families would not have to depend on taxpayer-funded welfare benefits.

H.R. REP. NO. 104-651, at 1347 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2406 (1996). Additional legislative history to the PRWORA, which includes extensive hearing testimony, confirms the centrality of child support to welfare reform.

<sup>98</sup> 42 U.S.C. §§ 654, 666–67 (1996); 45 C.F.R. § 302 (2008).

<sup>99</sup> 45 C.F.R. § 302.50 (2008).

<sup>100</sup> 45 C.F.R. § 302.56 (2008).

<sup>101</sup> JOSEPHSON, *supra* note 18, at 36 (referencing public documents).

<sup>102</sup> OFFICE OF CHILD SUPPORT ENFORCEMENT, DEPT OF HEALTH AND HUMAN SERVS., NATIONAL CHILD SUPPORT ENFORCEMENT STRATEGIC PLAN, FISCAL YEAR 2005–2009 PRELIMINARY REPORT 6 (2004), [http://www.acf.hhs.gov/programs/cse/pubs/2004/Strategic\\_Plan\\_FY2005-2009.pdf](http://www.acf.hhs.gov/programs/cse/pubs/2004/Strategic_Plan_FY2005-2009.pdf).

longer primarily a welfare reimbursement device,”<sup>103</sup> other goals in the Strategic Plan continue to include welfare cost-recovery.<sup>104</sup>

The most recent Strategic Plan is largely silent on family complexity, mentioning only the need to “update child support guidelines to recognize modern family dynamics and realities (e.g. shared custody, incomes of custodial parents, etc.)” without specifying goals or objectives on this point.<sup>105</sup> Although one strategy in the Strategic Plan is to emphasize prevention and early intervention by “provid[ing] information and education to parents about the impact of marriage and single parenting on the financial security of children,” there is no reference to multiple families or family complexity or any description of the information to be provided.<sup>106</sup> In sum, federal child support policy documents fail to address family complexity in a meaningful way, leaving states to make important policy decisions without guidance.

*C. Federal Advisory Panel on Child Support Guidelines Failed to Provide Guidance Regarding Multiple Families in State Child Support Guidelines*

The three federal child support goals are implemented through federal laws and state guidelines.<sup>107</sup> Despite heavily regulating state guidelines, the federal government does not provide guidance to states about complex families. There is considerable federal control over the guidelines: federal law requires that guidelines apply presumptively and that written findings support awards that deviate from the state guidelines.<sup>108</sup>

The Federal Advisory Panel on Child Support Guidelines, which called for the passage of the 1988 Act, established the underlying methodology of child support guidelines, devoid of any goals for multiple families.<sup>109</sup> The goals of the guidelines included making orders more consistent with costs of child-rearing,<sup>110</sup> improving equity among orders, and improving efficiency

<sup>103</sup> *Id.* at 1.

<sup>104</sup> For example, improving the collection rate in welfare cases remains an explicit goal in the Strategic Plan. *Id.* at 8 (“Objective A: To increase the IV-D Collection Rate”).

<sup>105</sup> *Id.* at 2.

<sup>106</sup> *Id.* at 10.

<sup>107</sup> See discussion *supra* Part III.A.

<sup>108</sup> MORGAN, *supra* note 6, § 1.02(c). The Family Support Act of 1988 dealt explicitly with state guidelines, and was codified as federal regulation 45 C.F.R. § 302.56 (2007).

<sup>109</sup> ROBERT WILLIAMS, U.S. DEP’T OF HEALTH AND HUMAN SERVS., DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS: ADVISORY PANEL RECOMMENDATIONS AND FINAL REPORT (1987).

<sup>110</sup> *Id.* pt. II, at ii–iii, 13–40. In distinguishing between poor families and non-poor families, the Panel wrote, “[a]lthough a subsistence level standard for supporting children is a useful benchmark, child support guidelines must be applied to the preponderant number of households with incomes above the subsistence level.” *Id.* pt. II, at 17. This comment shows a preoccupation with non-poor families and a disregard for the specific concerns of low-income families.

by encouraging settlements and reducing the hearing time to resolve contested cases.<sup>111</sup> In 1987, the Advisory Panel on Child Support Guidelines recommended that states follow a number of principles in enacting guidelines, including that “[b]oth parents share legal responsibility for supporting their children,” with the economic responsibility divided between the parents in proportion to their income, that the child is entitled to share in the benefit of the improved standard of one parent, and that the guidelines should not create “extraneous negative effects on the major life decisions of either parent.”<sup>112</sup> However, the role of new relationships and remarriage in child support policy is often subtle, as reflected in this passage from the ALI Principles on Family Dissolution:

[A] parent’s interest in remarriage has not been taken into account in formulating the objectives of this Chapter. Historically, this interest was invoked to justify low child support payments. The notion was that the payor, almost invariably the father, needed to retain his earnings in order to remarry. This view comes from a time when men earned a family wage and married women were not expected to participate in the labor force. Today, remarriage often increases the support payor’s household income. More importantly, each parent has an interest in remarriage, and each may be understood to bring negative dower, in the form of preexisting child-care and child-support obligations, to a new relationship. Recognizing only the nonresidential parent’s interest in remarriage by reducing the otherwise appropriate amount of his child-support payment would unjustifiably increase the negative dower of the residential parent. Thus, each parent’s interest in remarriage offsets the other’s.<sup>113</sup>

Although the Advisory Panel on Child Support Guidelines principles recognize that parents may have other dependents or remarry, they fail to explain how to resolve the tension between existing and subsequent families.

As early as 1987, the Advisory Panel on Child Support Guidelines recognized the complexity of the issue of multiple families, but failed to address the actual design of child support guidelines.<sup>114</sup> The Panel

---

<sup>111</sup> *Id.* pt. II, at 1–6; see also MORGAN, *supra* note 6, § 1.02(e) (characterizing the summary of the Final Report (Part II) as having these elements).

<sup>112</sup> WILLIAMS, *supra* note 109, pt. I, at 4. The Advisory Panel specifically stated (in endorsing the income-shares model) that the income of a new spouse would not affect the obligation. *Id.* pt. I, at 17.

<sup>113</sup> ALI PRINCIPLES, *supra* note 6, § 3.04 cmt. g.

<sup>114</sup> WILLIAMS, *supra* note 109, pt. I, at 23–24. For example, the Advisory Panel recommended additional research into “situations involving multiple support responsibilities” in order to “yield equitable results for the children involved and their parents,” but there is no substantive discussion on what would be “equitable.” *Id.* As another example, the Panel expressed concern about assumptions regarding the relationship between “other natural children” and income of the current spouse. *Id.* pt II, at 51–55.

recommended that guidelines address the “treatment of multiple child support responsibilities,” stating the following principles:

(1) When a parent has multiple child support responsibilities, each child entitled to support . . . should share equally in that parent’s resources, subject to the variations required by the needs of the individual child and the amount of support due that child from the child’s other parent; (2) . . . a support award should consider all support responsibilities of a parent when support is set for any child of the parent; and, (3) . . . funds a parent is required by law . . . and actually pays [for an existing order] should be considered unavailable for calculating support [in a new case].<sup>115</sup>

Despite this recommendation, the Panel did not suggest a method for allocating child support among families.<sup>116</sup> Instead, the Panel noted that courts have been divided on how to treat support obligations for subsequent dependents of either parent and stated that the choice “should be made after a review of constitutional law, case law, and current practice in the state.”<sup>117</sup> Additionally, the Panel stated that “complex fact situations may at times require departure from guidelines, particularly in cases of multiple child support responsibilities.”<sup>118</sup> These recommendations fail to provide any concrete instructions or goals with regard to complex families.

The overall goal of child support guidelines remains to reduce the cost of child support collection for the federal government, without attention to multiple families.<sup>119</sup> By ignoring the needs of multiple families, the goals of federal child support laws are both misguided and unsuccessful. Multiple families, especially low-income families, should not be ignored by policy makers.

<sup>115</sup> *Id.* pt. I, at 19.

<sup>116</sup> The Panel described three approaches to allocation: giving priority to first-born children; according equal weight to the interests of all dependent children; and giving priority to children in the current household of the obligor. *Id.* pt. II, at 53. This report is unique in its description of a “last in first out approach” that explicitly gives priority to the children currently living with the obligor. *See id.*

<sup>117</sup> *Id.* The Panel did suggest that the most “administratively viable” approach is to subtract preexisting orders from the obligor’s income. *Id.* pt. II, at 54.

<sup>118</sup> *Id.* pt. I, at 19. This appears to be an implicit concession to fathers, at least based on the standard assumed paradigm that fathers are more likely to exit from the first family and then remarry. Moreover, the Panel did not advise including stepparent income because of “additional complexity that would be caused by inclusion of this factor.” *Id.* pt. II, at 55.

<sup>119</sup> MORGAN, *supra* note 6, § 1.02(e) (explaining that fiscal concerns provide the nexus that permits Congress to legislate in this area). In addition to the goals established in the federal child support laws, in the legislative history, and in OSCE reports, other sources may offer insight into the purposes of federal and state involvement in child support. For example, the ALI Principles also fail to account for family complexity and resource allocation among low-income multiple families. *See* ALI PRINCIPLES, *supra* note 6, § 3.04 (outlining nine objectives, none of which address the specific needs of multiple families).

IV. CRITIQUING FEDERAL INVOLVEMENT IN CHILD SUPPORT: HOW FISCAL SAVINGS, CHILDREN'S ECONOMIC WELL-BEING, AND PARENTAL INVOLVEMENT FAIL AS GOALS

Each of the three stated goals of federal child support laws — fiscal savings, children's economic well-being, and public enforcement of parental responsibility — is worthy of critique. Like most public policy, child support laws must accommodate multiple and conflicting interests and goals.<sup>120</sup> For example, children's economic well-being is in obvious conflict with limiting governmental expense.<sup>121</sup> This Article explores the ways in which these goals, already problematic as applied to traditional families, are not suited to address the needs of complex families, and should not drive child support policy.

A. *Fiscal Savings Is an Unattainable and Unworthy Goal*

Fiscal savings is a proven failure for poor families and for multiple families. Fiscal savings should not be a component of child support policy because it prefers the state's financial interests over children's well-being. Multiple families compound the already significant challenges of fiscal savings in single-family households.

Child support collection has been criticized as a fiscal failure, particularly because of the high administrative costs.<sup>122</sup> According to the OCSE 2007 annual report, nearly \$25 billion in child support payments were collected and distributed.<sup>123</sup> However, this figure includes voluntary payments that require no significant effort to collect, such as income withholding, which accounts for almost seventy percent of payments.<sup>124</sup> The costs of administration make fiscal savings particularly unlikely for multiple families.<sup>125</sup> Although there is no data on what percentage of the voluntary

---

<sup>120</sup> See JOSEPHSON, *supra* note 18, at 43 (arguing that we should expect child support policies to have conflicting goals for a number of reasons, including their links to social welfare policy, their support from both liberal and conservative politicians, and their connection to families and family relationships); see also ALI PRINCIPLES, *supra* note 6, § 3.04 cmt. a (2002) (recognizing that many of its stated goals conflict); Minow, *supra* note 7, at 319–20 (arguing that the basic purposes of child support conflict).

<sup>121</sup> JOSEPHSON, *supra* note 18, at 46.

<sup>122</sup> See Daniel Hatcher, *Child Support Harming Children: Subordinating the Best Interest of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1070–74 (2007).

<sup>123</sup> OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 9, at A-1.

<sup>124</sup> JOSEPHSON, *supra* note 18, at vii, C-8.

<sup>125</sup> See Hatcher, *supra* note 122, at 120 (noting that “in 2004, only ten states were still making a profit on the child support program and states in the aggregate lost over \$515 million”); Ronald K. Henry, *Child Support Policy and the Unintended Consequences of Good Intentions*, in THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS 128, 129 (William S. Comanor ed., 2004) (noting that, in the 2000 fiscal year, the federal government spent \$3 billion on child support enforcement and recovered less than \$1 billion).

payments are for children in complex families, it is unlikely, given the challenges of administering multiple income-withholding orders, that multiple families receive a higher percentage of payments.<sup>126</sup> Administrative expenses offset a significant portion of the remaining collections expenses exceeding \$5 billion; the federal administrative expenses in 2007 were \$3.7 billion and state administrative expenses were \$1.9 billion.<sup>127</sup> Child support recovery is unlikely to become cost effective because the enforcement agencies continue to expand their responsibilities and employ over 60,000 full-time employees.<sup>128</sup> For complex families, administrative costs increase because the enforcement agencies must sort through multiple support orders and enforcements across state lines.<sup>129</sup> Additionally, the increased interstate movement of families is a pressing, yet often overlooked, topic in child support, as demonstrated by the procedures developed under UIFSA and the creation of interstate child support enforcement protocols.<sup>130</sup>

The fiscal failure is even more apparent, and exacerbated, for low-income complex families. For example, there are limited fiscal savings where a child support order raises one family above the poverty line but does not eliminate welfare dependency for another family. It is unlikely that enforcement related to welfare cost recovery is cost effective for complex families.<sup>131</sup> Of the \$25 billion in child support payments recovered in 2007, less than \$2 billion were for welfare recovery.<sup>132</sup> Significantly, at the poverty level, the costs of the enforcement bureaucracy outweigh the amount of support collected, particularly where the enforcement agencies must handle

---

<sup>126</sup> See *infra* note 129 and accompanying text; see also *supra* note 79 and accompanying text (stating that individual states are permitted to impose caps on total assistance per family); *supra* note 119 and accompanying text (asserting that ALI principles fail to account for multiple families).

<sup>127</sup> OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 9, at A-1, C-13. The federal government reimburses most of the state expenses. For example, according to the FY 2006 report, “[t]he federal government reimburses the states for 66% of allowable administrative expenses and 90% of laboratory paternity tests.” OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP’T OF HEALTH AND HUMAN SERVS., FY 2006 PRELIMINARY REPORT (2007), [http://www.acf.hhs.gov/programs/cse/pubs/2007/preliminary\\_report](http://www.acf.hhs.gov/programs/cse/pubs/2007/preliminary_report).

<sup>128</sup> See OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP’T OF HEALTH AND HUMAN SERVS., FY 2006 PRELIMINARY REPORT (2007), available at [http://www.acf.hhs.gov/programs/cse/pubs/2007/preliminary\\_report](http://www.acf.hhs.gov/programs/cse/pubs/2007/preliminary_report); see also JOSEPHSON, *supra* note 18, at 48 (discussing enforcement agencies’ expanding responsibilities).

<sup>129</sup> This applies even to complex families with ample financial resources. A seemingly simple income-withholding order may be an administrative challenge and expense where the agency responsible for the wage withholding has to redistribute the withholding to several families.

<sup>130</sup> See UIFSA §§ 101–905. Interstate cases involving multiple families pose an additional drain on the resources of enforcement agencies.

<sup>131</sup> Hatcher, *supra* note 122, at 1070–74 (suggesting that welfare cost recovery efforts are likely not cost effective); see Turetsky, *supra* note 59, at 402. Because of these failures, I do not support improving the enforcement mechanisms for multiple families.

<sup>132</sup> OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 9, at A-1. This data does not differentiate between complex and non-complex welfare families. However, if welfare cost recovery fails even for non-complex families, it most likely fails for more complex families.

many open cases for one parent with multiple children.<sup>133</sup> Moreover, fiscal savings are impossible if the child support obligor does not have the funds to repay the state.<sup>134</sup> Similarly, there are no savings where the obligor cannot pay arrears.<sup>135</sup> For multiple families, the goal of fiscal savings is unlikely to be met as long as there are outstanding child support obligations for any one of the families.

Tough child enforcement policies aim at fiscal savings, but these methods have proven especially ineffective in assisting low-income families.<sup>136</sup> Where multiple families are also low-income, the children receive little benefit from rigorous child support enforcement.<sup>137</sup> Moreover, state enforcement of child support obligations does not benefit all women and their children to the same degree. State enforcement of child support benefits formerly married women more than unmarried women because formerly married women are likely to receive more child support.<sup>138</sup> Child support enforcement mechanisms are also more likely to help middle-class and upper-class parents than low-income parents because wage withholding, typically more available to middle- and upper-class parents, is a more effective enforcement mechanism than the mechanisms available to low-income parents.<sup>139</sup> As an example, non-TANF families received eighty-four percent of

---

<sup>133</sup> See Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1070 n.358 (1995); see also Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates*, 33 FAM. L.Q. 235, 237 (1999) (stating that no matter what means are used, collection from impoverished demographics is impossible). Child support cases are typically not consolidated.

<sup>134</sup> For example, a low-income parent who does not have the funds to pay child support directly to the other is unlikely to have the funds to repay the state the costs of welfare payment. Additionally, there is little incentive to pay the state given that the parent sees no direct benefit to the child. See Hatcher, *supra* note 122, at 1074–82.

<sup>135</sup> The story of child support arrears is complicated. In 2007, there were over \$107 billion of arrears owed. OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 9, at viii (finding that only \$7 billion of that amount was collected). Most of the arrears are owed by a small number of noncustodial parents, each of whom owes a large amount of arrears. See SORENSON, SOUSA & SCHANER, *supra* note 23, at 16 (finding, in a study of nine states, that eleven percent of the obligors owed over fifty percent of the arrears and each owed over \$30,000).

<sup>136</sup> See Hatcher, *supra* note 122, at 1066–82.

<sup>137</sup> See, e.g., Elrod, *supra* note 42, at 708.

<sup>138</sup> One study explicitly found that states with effective child support enforcement (measured by strict legislation and high expenditures) are more likely to help children born into marital families. See Chien-Chung Huang, *The Impact of Child Support Enforcement on Nonmarital and Marital Births: Does it Differ by Racial and Age Groups?*, 76 SOC. SERV. REV. 275, 275 (2002). At the same time, “formal” child support awards are less common among women who have not been married. See Case, Lin & McLanahan, *supra* note 11, at 173; see also Leena Nepomnyaschy, *Child Support and Father-Child Contact: Testing Reciprocal Pathways*, 44 DEMOGRAPHY 93, 93 (2007) (“[C]hildren born to never-married parents tend to experience even more disadvantages because these families are more likely to be poor, more likely to receive public assistance, and less likely to receive child support than children born to previously married parents.”).

<sup>139</sup> See ChildTrends DataBank, Child Support Receipt, <http://www.childtrendsdata.bank.org/indicators/84childsupport.cfm> (last visited Dec. 1, 2008) (noting that higher ed-

child support collections in 2007.<sup>140</sup> Given the prevalence of family complexity in TANF families, it is likely that these families are particularly ill-served by child support enforcement measures.<sup>141</sup> Additionally, significant research indicates that strong child support enforcement merely reduces the amount of informal support, meaning that an increase in formal support contributes little to the total amount of support received.<sup>142</sup> Despite the government expenditures on child support enforcement, poor families do not receive significant financial benefits from tough enforcement.<sup>143</sup> In addition to failing to provide financial benefits to poor children, tough enforcement also provides no fiscal benefit to the government.<sup>144</sup> Accordingly, where complex families contain unmarried or low-income parents, they are less likely to be helped by child support enforcement.

State enforcement in the name of fiscal savings is also widely criticized as punitive to poor women. Because states require welfare recipients to assign their child support rights to the state, recipients of AFDC have no choice in whether or not to enforce the child support obligations of a non-custodial parent.<sup>145</sup> The punitive nature of child support enforcement adversely influences the caseworker's perception, suggesting that poor mothers lie or withhold information and poor fathers fail to assume responsibility.<sup>146</sup>

---

educational status and having been previously married both correlated to a higher rate of receiving child support payments); *see also* MAUREEN R. WALLER, *MY BABY'S FATHER: UNMARRIED PARENTS AND PATERNAL RESPONSIBILITY* 3, 6 (Cornell Univ. Press 2002) (explaining that child support enforcement has not been effective for families headed by unmarried mothers); Martha Garrison, *The Goals and Limits of Child Support Policy*, in *CHILD SUPPORT: THE NEXT FRONTIER* 16, 31 (J. Thomas Oldham & Marygold S. Melli eds., 2000) (indicating that for middle- and upper-class parents, wage withholding has been effective in improving payment rates); Turetsky, *supra* note 59, at 404 ("Black and Hispanic children are less likely to have child support orders, or to receive child support, and they tend to receive lower amounts.").

<sup>140</sup> OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 9, at C-7.

<sup>141</sup> *See* TONYA BRITO, INST. FOR RESEARCH ON POVERTY, *CHILD SUPPORT GUIDELINES AND COMPLICATED FAMILIES: AN ANALYSIS OF CROSS-STATE VARIATION IN LEGAL TREATMENT OF MULTIPLE PARTNER FERTILITY* 1 (2005), available at [http://www.irp.wisc.edu/research/childsup/csde/publications/brito\\_05.pdf](http://www.irp.wisc.edu/research/childsup/csde/publications/brito_05.pdf). For data on family complexity in TANF families, see sources cited *supra* note 15.

<sup>142</sup> Nepomnyaschy, *supra* note 138, at 95. Moreover, formal punitive child support policies may encourage fathers to cease involvement in their children's lives. *Id.* at 109.

<sup>143</sup> *See* Maldonado, *supra* note 70, at 1014 (suggesting that child support enforcement is of "little or no benefit" to children of poor fathers because the money goes to the state, the benefits of child support receipt are not as high when made non-voluntarily, and formal enforcement may lead to greater conflict between parents).

<sup>144</sup> *See* sources cited *supra* note 125.

<sup>145</sup> *See, e.g.*, MARY FARRELL, MICHAEL FISHMAN, STEPHANIE LAUD & VINCENA ALLEN, DEP'T OF HEALTH AND HUMAN SERVS., *UNDERSTANDING THE AFDC/TANF CHILD-ONLY CASELOAD: POLICIES, COMPOSITION, AND CHARACTERISTICS IN THREE STATES* (2000), available at <http://aspe.hhs.gov/HSP/child-only-caseload00/execsum.htm> (stating that as a condition of receiving TANF benefits, parents must assign child support rights to the state; this condition often applies to relative caregivers as well).

<sup>146</sup> Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 975-76 (1997) (arguing that the "cooperation" requirement is really a way to impose morality, and that, although race-neutral, the requirement still involves race as it may affect the caseworker's perception of her client and the income potential of

Welfare recipients who have children with multiple partners are subject to these assumptions, and, at the same time, receive little advantage from their participation in child support enforcement.<sup>147</sup> In contrast to the forced cooperation requirement for welfare recipients, mothers who are not welfare recipients and not obligated to cooperate with the state frequently choose not to enforce child support obligations.<sup>148</sup> State enforcement also punishes poor women “by linking benefits to specific behaviors,” which may be exacerbated for parents who have children with multiple partners.<sup>149</sup> Fiscal savings carried out through tough enforcement punishes individual women without fiscal benefit to the state. The new theory of limited equalization rejects fiscal savings because it ineffectively prioritizes federal and state economic interests over children’s interests.<sup>150</sup>

*B. The Goal of Children’s Economic Well-being Is Based on False Assumptions About Dissolving Nuclear Families and Ignores Poverty Prevention*

Current support laws do not serve the goal of improving children’s economic well-being and have further damaged the economic well-being of poor and complex families. As conceived, the goal of improving children’s

---

the father); Turetsky, *supra* note 59, at 402 (arguing for distribution reform); *see also* WALLER, *supra* note 139, at 118–35 (analyzing interviews with unmarried parents whose children receive support and demonstrating the ways in which forced cooperation and enforcement were detrimental to children). The forced cooperation requirement has been especially criticized for its impact on domestic violence victims. *See, e.g.*, Jyl Josephson, *The Intersectionality of Domestic Violence and Welfare in the Lives of Poor Women*, in DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE, CLASS, GENDER, AND CULTURE 83 (Natalie Sokoloff ed., 2005).

<sup>147</sup> The very limited exception is that the first \$50 per month of child support collected by states is ordinarily remitted to the family and not counted as income. Hatcher, *supra* note 122, at 1030.

<sup>148</sup> Of the 13.6 million custodial parents in 2006, fewer than fifty-eight percent had legal support agreements. U.S. BUREAU, CUSTODIAL MOTHERS AND FATHERS, *supra* note 13, at 5. Of the custodial parents without orders, twenty-four percent said that they did not have an order because of the noncustodial parents’ inability to pay. *Id.*; *see also* Chien-Chung Huang & Hillard Pouncy, *Why Doesn’t She Have a Child Support Order? Personal Choice or Objective Constraint*, 54 FAM. REL. 547, 552 (2005) (finding in one study that two groups — young and highly educated mothers — were more likely to cite personal choice for not having a support order); Garrison, *supra* note 139, at 16 (noting that women report that they do not want to pursue an award for a variety of reasons, including a belief that the father does not have the funds, a belief that the father would not pay even if he had the funds, a fear of retaliation or domestic violence, or a belief that contested litigation would interfere with the parents’ relationship or the parent-child relationship).

<sup>149</sup> JOSEPHSON, *supra* note 18, at 131.

<sup>150</sup> Even within the standard paradigm, the fiscal savings goal has been widely critiqued. *See, e.g.*, JOSEPHSON, *supra* note 18, at 149–50 (noting that child support policy ignores the state’s role in using state resources to support “ostensibly economically independent families” and turns focus away from “collective responsibilities for the support and well-being of children”).

economic well-being is based on faulty assumptions, and it is too narrowly construed to be workable for multiple families.

First, the child support system fails to achieve this goal because it only applies to a small subset of families: the goal is designed to protect the financial situation of children in one cohabitating family that is dissolving. The premise is that children should not be economically harmed by the dissolution of a family and that children should not bear the brunt of the extra costs associated with establishing two homes.<sup>151</sup> While this goal may, at most, serve children whose parents were living together at some point, it ignores the interests of children raised in other settings.<sup>152</sup> Additionally, this goal frequently fails even under the standard paradigm because “child support policies do not actually contemplate ‘equalization’ of the standards of living in the residential and nonresidential households.”<sup>153</sup> Although there is seemingly nothing objectionable about preventing children from bearing the costs of dissolution, it is unclear how this goal is implemented, given that state child support guidelines are based on parents’ income. Moreover, economic well-being is important to all children, not just those who were once in cohabitating families.

Although child support laws attempt to protect children from the economic costs associated with family dissolution, this goal is challenging in multiple families, even if one believes it is a legitimate goal. Child support laws cannot offset the costs of family dissolution because “two households cannot live as cheaply as one.”<sup>154</sup> Child support policy simply cannot “raise the income of a child support obligor or recreate the economies of scale available to an intact household.”<sup>155</sup> If income is divided equally, two (or more) households may end up in poverty.<sup>156</sup> Absent substantial resources, economic well-being is difficult to achieve where there are numerous households requiring financial support.

Moreover, the child support system has not met the goal of enhancing children’s economic well-being for many of the low-income complex families in the child support system. Economic well-being is narrowly defined to

---

<sup>151</sup> See ALI PRINCIPLES, *supra* note 6, § 3.04 cmt. c (recognizing “widespread economic inadequacy in one-parent families” as a “grievous harm to children,” thereby justifying social involvement). However, the Comments recognize and defer to the interests of high-income parents reaping the benefits of their labor. ALI PRINCIPLES, *supra* note 6, § 3.04 cmt. d; see also David S. Rosettenstein, *Speculating on Stock Options and Child Support: Long on Income and Short on Value (and Theory) — A Jurisprudential Attempt at a Butterfly Straddle?*, 82 NEB. L. REV. 947, 952 (2004) (noting that the Principles accept that the higher-income parent is entitled to a higher standard of living).

<sup>152</sup> See Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 PEPP. L. REV. 359, 365–69 (2007) (critiquing the basis of an “intact” household as the norm for determining support awards where it is not the majority of households).

<sup>153</sup> ALI PRINCIPLES, *supra* note 6, § 3.04 cmt. i.

<sup>154</sup> Garrison, *supra* note 139, at 24.

<sup>155</sup> *Id.*

<sup>156</sup> Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 580–90 (1990).

address only the child's immediate financial needs and does not account for poverty prevention. "Economic well-being" exists in the context of protecting the economic situation of one family at dissolution, while "poverty prevention" is a larger and more expansive goal. Poverty prevention is not an explicit goal of child support guidelines, although poverty may be a by-product of lack of support for children.<sup>157</sup> The most recent National Child Support Strategic Plan only loosely touches on poverty, and not at all in the context of multiple families.<sup>158</sup> Although inadequate child support certainly contributes to poverty of complex families,<sup>159</sup> even full enforcement of all existing support orders would have a minimal effect on reduction of poverty or welfare dependency.<sup>160</sup> Moreover, child support laws usually ignore the actual financial needs of poor women;<sup>161</sup> these laws also tend to prefer the interests of the nonresident parent.<sup>162</sup> For families on welfare (and thus not receiving child support), economic security is an illusion, given the low amounts of welfare payments, particularly where recipients have multiple children.<sup>163</sup>

Enhanced enforcement measures are also insufficient to address the problem of children living in poverty.<sup>164</sup> Problems with compliance are particularly difficult in low-income families, partially because low-income fathers may have disproportionately higher child support awards than higher-

---

<sup>157</sup> See Garrison, *supra* note 139, at 19 ("Only a few states utilize guidelines that take poverty prevention as an objective; none aim at maintaining the child's living standard or even at equalizing living standard loss."); Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates*, 33 FAM. L.Q. 235, 253 (1999) (criticizing "Robin Hood" assumptions in child support and impact on high-income fathers).

<sup>158</sup> The Plan addresses poverty by distinguishing between those who refuse to pay and those who cannot pay and by desiring to improve enforcement and collection in the "underground" economy. OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 102, at 12.

<sup>159</sup> Garrison, *supra* note 139, at 16-18; see also Engel, *supra* note 16, at 313 (studying the impact of remarriage on women's financial situations).

<sup>160</sup> ANDREA H. BELLER & WILLIAM J. GRAHAM, *SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* 212, 232 (Yale Univ. Press 1996). Even families with fully enforced support orders may still be poor. JOSEPHSON, *supra* note 18, at 151.

<sup>161</sup> JOSEPHSON, *supra* note 18, at 144.

<sup>162</sup> See Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 159 (1999) (noting that guidelines fail to avert poverty because they were not designed with this goal in mind). Garrison explains that "child support policy can avert a child's poverty only if that poverty derives from an income loss associated with family dissolution or non-formation." *Id.* at 175.

<sup>163</sup> See, e.g., Donald Tobin, *Investing in Our Children*, 73 U. CIN. L. REV. 457, 507-09 (2004) (arguing that we should spend more money on the welfare of children and discussing studies showing that families on public benefits spend their benefits on necessities).

<sup>164</sup> See Elrod, *supra* note 42, at 708; see also Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 371-74 (2005) (asserting that increased child support enforcement has largely failed to reduce child poverty).

income fathers.<sup>165</sup> In multiple families without resources, compliance with support orders is even less likely.<sup>166</sup> Child support awards based on parental income cannot support children's economic well-being if the parents have no income or are unable to comply with multiple child support orders.<sup>167</sup> Through limited equalization, child support policy would focus on the actual economic needs of children and on poverty prevention in complex families. Instead of a definition of "economic well-being" that is unattainable given family demographics, child support policy should be refocused on poverty prevention.

C. *The Goal of Parental Involvement Limits Public Responsibility for Children and Uses Child Support as a Proxy for Involvement*

Although federal child support laws aim to encourage parental responsibility, this goal is flawed and unrealized for several reasons. First, "parental responsibility" masks governmental unwillingness to care for children by focusing on the private failures of individual fathers.<sup>168</sup> Focusing on the private failures of individuals may lead to parents who have children with multiple partners being further demonized for failing to "take responsibility." Child support laws have "constructed the problem as one of 'deadbeat dads'

---

<sup>165</sup> See, e.g., Daniel Meyer & Judi Bartfeld, *Compliance with Child Support Orders in Divorce Cases*, 58 J. MARRIAGE & FAM. 201 (1996); see also D.C. CHILD SUPPORT GUIDELINE COMMISSION, *supra* note 76, pt. II, ch. 2, at 9 (citing a 2000 HHS Study demonstrating the need to focus on ability to pay, rather than imputed income).

<sup>166</sup> See SORENSON, SOUSA & SCHANER, *supra* note 23, at 6, 31–32 (obligors with more than one order owed twice as much of the arrears as compared to obligors with one order). Moreover, the median percent of current support paid by obligors with multiple orders was thirty-six percent, as compared to sixty-two percent for those with one order. *Id.* at 66–67.

<sup>167</sup> This concern is relevant in the context of child support issues that arise for incarcerated parents. See OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP'T OF HEALTH AND HUMAN SERVS., INCARCERATION, REENTRY AND CHILD SUPPORT ISSUES: NATIONAL AND STATE RESEARCH OVERVIEW REPORT 2, 4 (2006), available at [http://www.acf.hhs.gov/programs/cse/pubs/2006/reports/incarceration\\_report.pdf](http://www.acf.hhs.gov/programs/cse/pubs/2006/reports/incarceration_report.pdf) (relying on Bureau of Justice Statistics, noting that sixty-three percent of federal and fifty-six percent of state prisoners have children under the age of eighteen and that many prisoners enter prison with preexisting child support debt); see also Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAM. L.Q. 191, 192 (2006) (arguing that parental involvement of incarcerated fathers benefits children and society).

<sup>168</sup> See Mary Jane Mossman, *Child Support or Support for Children — Re-Thinking Public and Private in Family Law*, 46 U. N.B. L.J. 63, 75 (1997) (describing how defining the "public problem of 'support for children' has been reprivatized as the problem of deadbeat dads"); see also Altman, *supra* note 26, at 174–75 (suggesting that "we should understand private child support duties primarily as remedies for parental wrongs" such as failing to demonstrate love to the child); Nancy Dowd, *supra* note 68, at 19, 30 (1995) ("[P]ublic income transfers far overshadow private transfers as sources of single-parent income."); Fineman, *supra* note 71, at 209 (writing that federal child support laws obscure the public need to "take responsibility for children beyond the private family"). Additionally, the ALI Principles recognize that the United States is unique among "other wealthy Western countries" because of its "disinclination to act as a primary guarantor of children's economic adequacy." ALI PRINCIPLES, *supra* note 6, § 3.04 cmt. h.

and the corresponding solution as a package of mandatory guidelines and more effective enforcement mechanisms.”<sup>169</sup> As a result, “the power to define the social problem of child support and appropriate solutions has been used strategically to narrow the parameters of public critique of these proposals.”<sup>170</sup> By focusing on private payment, child support laws ignore what Martha Fineman calls the universal problem of dependency.<sup>171</sup> Although parental responsibility is important, it should not be used to deny the need for government assistance for complex families or to limit the scope of the problem. Instead, child support policy should widen support responsibility, both publicly and privately, to assist multiple families.

Second, defining “parental responsibility” only in terms of private formal economic child support incorrectly equates “parental responsibility” with economic payment.<sup>172</sup> The child support guidelines “are not designed to have any direct effect on children’s emotional or psychological well-being, their self-esteem, their identity, or their relationship with either parent.”<sup>173</sup> However, child support, whether formal or informal, is only one component of parenting.<sup>174</sup> Although the most recent National Strategic Plan observes the importance of actual parental involvement, its comments are limited and do not refer to multiple families.<sup>175</sup>

The relationship between child support and child contact is complicated and the subject of widespread disagreement.<sup>176</sup> This relationship may be even more complicated in multiple families.<sup>177</sup> Numerous studies have examined the relationship between support and involvement, albeit inconclusively.<sup>178</sup>

---

<sup>169</sup> Mossman, *supra* note 168, at 65 (discussing the framing of this issue in Canada and the fundamental limitations of guidelines).

<sup>170</sup> *Id.*

<sup>171</sup> Fineman, *supra* note 71, at 219 (child support is only “one component of a complex series of issues surrounding the question of who should bear the economic and social costs of caring for dependent members of society”). Brenda Cossman explains how child support and welfare have been used to privatize dependency partially. Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 442–59 (2005).

<sup>172</sup> Even if one recognizes the importance of parents fulfilling the responsibilities and obligations that attach to parenthood, one might criticize the public accountability rhetoric of this goal.

<sup>173</sup> JOSEPHSON, *supra* note 18, at 45 (explaining that the program’s mechanisms are legal and economic).

<sup>174</sup> Edythe Krampe, Book Note, 65 J. MARRIAGE & FAM. 500, 500 (2003) (finding that both fathers and mothers believe good fathering requires more than economic support).

<sup>175</sup> OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 102, at 6 (observing broad recognitions such as, “[a] legal and emotional relationship between parents and children is essential”).

<sup>176</sup> See Nepomnyaschy, *supra* note 138, at 109.

<sup>177</sup> None of the studies described below focus on complex families.

<sup>178</sup> A full analysis of these studies is outside the scope of this article. Correlations may exist between any number of variables, including payment, contact, and the formality of the support. See, e.g., Nepomnyaschy, *supra* note 138, at 105–08. Visitation may provide an opportunity to exchange informal support. *Id.* at 108; see also Maldonado, *supra* note 70, at 961–62 (citing studies that children do better when their fathers pay

As a legal matter, visitation and support typically have limited, or no, connection.<sup>179</sup> One exception is that even where child support compliance and visitation are not explicitly linked, the time a child spends with a parent usually has an effect on the calculation of the child support order, which depends on the model employed by state-specific child support guidelines. For example, some states have parenting-time adjustments so that increased time with a child over a certain threshold may reduce the amount owed.<sup>180</sup> However, linking the calculation to visitation may give parents room to manipulate visitation to decrease payments.<sup>181</sup> The current trend is toward disconnecting visitation and support.<sup>182</sup> Regardless, many parents perceive or experience a real connection between support and visitation.<sup>183</sup> Child support policy should examine what “parental responsibility” should mean when a parent has more than one child with different partners. Encouraging parents to provide economic support for complex families should only be one component of child support policy.

As implemented, each of the three goals for federal involvement in child support fails for multiple families. Accordingly, new goals are needed to reflect the complexities of families today. Until new goals exist, states that implement the three goals of federal child support policy through their state child support guidelines will continue to disserve children in multiple families. Limited equalization, described more fully below, reflects a new policy choice that prioritizes supporting existing children while expanding the available resources for all children.

---

child support and discussing link to visitation); Laura W. Morgan with Chuck Shively, *The Link Between Visitation and Support Compliance* (2000), <http://www.childsupportguidelines.com/articles/art200012.html> (writing that “efforts to increase contact will not necessarily result in more child support” though “efforts to enforce compliance with payment of child support could lead to more child contact”).

<sup>179</sup> See Morgan, *supra* note 178.

<sup>180</sup> See Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews*, 43 FAM. CT. REV. 415, 424 (2005) (showing states that allow for a time-sharing adjustment).

<sup>181</sup> See Beld & Biernat, *supra* note 42, at 198–99 (discussing relevant incentives).

<sup>182</sup> See Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619, 619 (1989). The ALI recognizes “some reciprocal relationship between support and access”; interference with access is not a defense to nonpayment and vice versa, but permit orders may be modified based on interference with access and nonpayment. ALI PRINCIPLES, *supra* note 6, § 3.14(3) cmt. a.

<sup>183</sup> See Estin, *supra* note 133, at 1078 (discussing the empirical and clinical studies that document the connection between visitation and child support); Lin & McLanahan, *supra* note 14, at 392 (finding the “correlation between obligations and rights is positively related for mothers but not for fathers”); Judith A. Seltzer, Sara S. McLanahan & Thomas L. Hanson, *Will Child Support Enforcement Increase Father-Child Contact and Parental Conflict after Separation?*, in *FATHERS UNDER FIRE*, *supra* note 7, at 174–79 (suggesting that stricter child support enforcement is likely to increase fathers’ influence over their children but the effects may not be causally connected); see also Maldonado, *supra* note 67, at 923 (providing informal support often provides an opportunity to fathers to see their children); Nepomnyaschy, *supra* note 138, at 95 (formal punitive child support policies may encourage fathers to cease involvement in their children’s lives).

The complexity of the relationship between parental involvement and child support for multiple families should be explored further.

V. STATE CHILD SUPPORT GUIDELINES RESOLVE ISSUES OF RESOURCE ALLOCATION IN MULTIPLE FAMILIES WITHOUT FEDERAL GUIDANCE

None of the federal child support laws or goals specifically addresses a parent's obligation to children in two or more families. In the face of near federal silence on child support issues for complex families, states are left with the task of creating state guidelines without any federal policy guidance. This has led to ineffective child support guidelines and is especially detrimental to parents with complex families living in poverty. New child support goals would assist states in developing guidelines that account for family complexity. States should be transparent about policy decisions that have an effect on multiple families, particularly in deciding how to allocate scarce resources among families. In implementing limited equalization, states should clearly state their substantive criteria and articulate how those criteria meet the new goals of child support.

A. *The Dilemma for Guideline Models: "First Family First" or "Equalization"*

Several models for child support guidelines exist, most notably the income-shares model and the percentage-of-income model.<sup>184</sup> All of the child support guideline models are based on economic data and analysis,<sup>185</sup> and many factors influence how much support a family receives.<sup>186</sup> The income-shares model is currently the most common model.<sup>187</sup> Under this model, the child support amount is derived from the combined income of the parents, with the amount owed determined by apportioning a percentage of the com-

---

<sup>184</sup> See MORGAN, *supra* note 6, § 1.03(b), 1–15, for examples.

<sup>185</sup> For example, every four years states must revise their guidelines and consider economic data on the costs of raising children. Family Support Act of 1988, Pub. L. No. 100-485, § 128, 102 Stat. 2343 (1988). There has been little criticism of the failure to recognize the false neutrality of economic studies that themselves rely on hidden assumptions. See Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. CHI. LEGAL F. 167, 169 (2004) (questioning the seeming neutrality of reliance on economic models of determining appropriate child support amounts). For example, the models used to study the costs of raising children are ordinarily based on a heterosexual two-parent family. Additionally, estimates of actual costs of child-rearing are notoriously inaccurate. See Beld & Biernat, *supra* note 42, at 173–75 (describing how income-shares is more accurate). Moreover, one could argue that, at least in high-income families, the “economics” of child support is only activated when love “fails”: where parental altruism is insufficient. Estin, *supra* note 133, at 1070 (exploring the intersection of economics and the law of the family).

<sup>186</sup> Child support trends from 1968 to 1997 reveal that payments decreased in the 1970s and 1980s and began to rise in the mid-1980s and 1990s. Case, Lin & McLanahan, *supra* note 11, at 179. Inflation and declines in the wages of low-skilled fathers may also lower awards.

<sup>187</sup> Venohr & Griffith, *supra* note 180, at 417 (stating that at least thirty-three states used the income-shares model in 2004).

bined income to each parent.<sup>188</sup> The second most common child support guideline model is the percentage-of-income model, in which only the obligor's income is factored into the support calculation and the residential parent's income is not considered.<sup>189</sup> The non-residential parent is automatically the obligor, which differs from the income-shares model.<sup>190</sup> In addition to the income-shares and percentage-of-income models, several hybrid methods of calculation exist.<sup>191</sup> Child support orders for multiple families can be generated under each of these guideline models. Each of these models arguably reflects the federal goals of child support, particularly the assumptions about dividing households.<sup>192</sup> Each of these guideline models has different consequences for complex families.<sup>193</sup>

At issue is how state guidelines account for children born to parents who already have children with previous partners. Should the children in the two (or more) families be treated the same, "with a similar claim on the parent's resources, or are the children from the first family entitled to be given a higher priority?"<sup>194</sup> As Laura Morgan correctly observes, the issue is "whether a parent should be prevented from taking on additional child support responsibilities to the possible detriment of children in need of support or whether all children should be treated equally regardless of the parent's behavior."<sup>195</sup> Despite the seriousness of these questions, federal child support goals and laws are silent on the issue.

The two primary ways to allocate child support among families are "first family first" and "equalization."<sup>196</sup> The "first family first" policy is premised on the concept of child support as a "nondisclaimable duty that should not be altered by activities chosen by the obligor."<sup>197</sup> The rationale is that permitting retrospective modification gives no incentive to parents to avoid having additional children and in fact may provide an incentive to have additional children, where having additional children leads to a reduc-

<sup>188</sup> See Beld & Biernat, *supra* note 42, at 173–75.

<sup>189</sup> Susan A. Reorich, *Making Ends Meet: Toward Fair Calculation of Child Support When Obligors Must Support Both Prior and Subsequent Children*, 20 WM. MITCHELL L. REV. 967, 974–75 (1994) (describing the percentage of income model); Venohr & Griffith, *supra* note 180, at 421 (stating that at least thirteen states used this model in 2004).

<sup>190</sup> Reorich, *supra* note 189, at 974–75.

<sup>191</sup> For example, under the Melson formula, which applies in only two or three states, an income-shares approach exists up until basic needs are met, with the system switching to percentage-of-income for the obligor once the basic needs of the child and parent are met. See Venohr & Griffith, *supra* note 180, at 417 (stating that only Delaware, Hawaii and Montana used this model in 2004).

<sup>192</sup> For example, one concept behind income-shares is that a child should receive the same proportion of parental income that he or she would have received if the parents had not divorced, or the share he or she would have received if the parents lived together in an "intact" household. See MORGAN, *supra* note 6, § 1.03(b).

<sup>193</sup> See, e.g., WILLIAMS, *supra* note 109, pt. II, at 106–12.

<sup>194</sup> Minow, *supra* note 7, at 309.

<sup>195</sup> MORGAN, *supra* note 6, § 3.04(b)(1).

<sup>196</sup> See Thompson, *supra* note 5, at 250.

<sup>197</sup> Minow, *supra* note 7, at 320.

tion in required child support payments.<sup>198</sup> In practice, in calculating support orders for subsequent children under the “first family first” policy, judicial deference is ordinarily given to existing support orders for children born from prior relationships.<sup>199</sup> As of 2004, at least forty state guidelines “provide that a parent’s preexisting order is to be subtracted from the parent’s income prior to the determination of support.”<sup>200</sup> The ALI Principles explain the favoring of first families through the prior support deduction as follows:

A rule of strict equality among children of different families would require recalculation of existing child-support orders for children not before the court and perhaps not even subject to the court’s jurisdiction. A rule of priority is independently justifiable in equitable terms. A parent may be understood to come to a second family already economically diminished by obligations to a prior family, as by obligations to other creditors whose claims are not dischargeable in bankruptcy. Prior obligations should not, as a general matter, be retroactively reduced in light of obligations subsequently undertaken.<sup>201</sup>

“Equalization,” the second way to allocate child support among families, calls for “equal treatment of all the children of a particular parent” on the basis that “[h]ad the parents stayed together and produced additional children, there would have been adjustments and a likely reduction in the resources available for the first child.”<sup>202</sup> “Equalization” supporters argue that the “first family first” policy limits the freedom to form new families<sup>203</sup> and that denying modifications interferes with a parent’s ability to support additional children.<sup>204</sup> Without any federal policy guidance in support of “equalization” or “first family first,” the predominant rule has become to give a preference to the first family.<sup>205</sup>

In choosing between “equalization” or “first family first,” one must consider the underlying assumptions about families and the goals of child support policy. As Martha Minow explains, we may be concerned about the freedom to form new families, troubled by family instability, or protective of existing children; each concern results in different policy choices.<sup>206</sup> The

<sup>198</sup> *See id.* at 309.

<sup>199</sup> MORGAN, *supra* note 6, § 3.04(a). The ALI Principles also require the subtraction of prior child support obligations from the obligor’s income. ALI PRINCIPLES, *supra* note 6, § 3.14(3) (limiting the reduction to payments that are actually made).

<sup>200</sup> Venohr & Griffith, *supra* note 180, at 425. However, even this policy is problematic in that it is the child support order itself that counts as a deduction, rather than compliance with the order.

<sup>201</sup> ALI PRINCIPLES, *supra* note 6, § 3.14 cmt. i.

<sup>202</sup> *See* Minow, *supra* note 7, at 309.

<sup>203</sup> *Id.*

<sup>204</sup> *See id.* at 315.

<sup>205</sup> This preference is minimized by deviations and deductions, as discussed *infra* note 280.

<sup>206</sup> Minow writes:

composition of the family and one's views about alternative or nontraditional families may compound the dilemma of which policy to choose. For example, "should it matter whether the new child is biologically the parent's or is a stepchild?"<sup>207</sup> Would it matter whether or not the family was married? Heterosexual? Whether the first child's standard of living would be better or worse than the second child's?<sup>208</sup> Would it matter whether or not child support policy motivated behavior or had an effect on children?<sup>209</sup> Without federal guidance, multiple families are shoehorned into existing state child support guidelines.

Child support guidelines treat existing children in several different ways, often depending upon the model used.<sup>210</sup> In the income-shares model, the "first family first" policy typically applies to existing children, along with the possibility of deductions and modifications for both parents.<sup>211</sup> Despite the ostensible simplicity of "first family first," numerous complications may arise. For example, the first family may not have an existing child support order in place prior to the birth of subsequent children. In this situation, the question in determining the award for a "first family" child is whether or not to count subsequent children in the "number of children" portion of the calculation.<sup>212</sup> For example, the court could apply the guidelines only to the children before the court, or the court could apply the guidelines to all the children that the parent is obligated to support and then prorate the total support for the children at issue.<sup>213</sup> Typically courts consider only the children whose support is at issue in defining the number of

---

If one is concerned about the noncustodial parent's freedom to move on and form a new family, surely he should be able to reduce his preexisting child support duty. If one is concerned about the child in the first relationship and worried that even the original child support order fails to bring that child up to the nonresidential parent's standard of living, a downward adjustment seems unfair and unwise. If one is troubled by family instability and the prospect of men fathering children with a series of different women, reinforcing the responsibilities of fatherhood seems important. Yet if one imagines that both parents have moved on to new relationships with new lovers and new children, the economic burdens the child support duty imposes on the nonresident parent seem unfair.

Minow, *supra* note 7, at 310.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Numerous studies examine whether or not the existence of a child support order, or strong enforcement, deters remarriage or having new children. *See, e.g.*, BELLER & GRAHAM, *supra* note 160, at 212 (arguing that child support policies do not deter remarriage). *But see* David E. Bloom, Cecilia Conrad & Cynthia Miller, *Child Support and Fathers' Remarriage and Fertility*, in *FATHERS UNDER FIRE*, *supra* note 7, at 128–29. The effect may also be different for men than for women and among low-income men. *Id.* at 132, 146.

<sup>210</sup> *See supra* note 193 and accompanying text.

<sup>211</sup> MORGAN, *supra* note 6, §3.04(b).

<sup>212</sup> *Id.* Additionally, if the new children are part of a cohabitating family, any parental support obligation for them would not be court-ordered.

<sup>213</sup> *Id.* § 2.02. Morgan explains some of the perverse financial issues associated with calculating the obligation the second way. *Id.*

children.<sup>214</sup> Under state guidelines, preexisting children may be handled as a deviation factor, or through calculating a “multiple family” order.<sup>215</sup> Guidelines rarely have explicit procedures for calculating child support orders for existing children where more than one new family is formed.

Under the guideline models, states handle subsequent children in calculating child support orders in a variety of ways:<sup>216</sup> as a mandatory required income deduction, as a discretionary income deduction, as a deviation factor, as a component of a self-serve reserve, or by providing no accommodation.<sup>217</sup> Subsequent children are often considered in a motion to modify a child support order for existing children.<sup>218</sup> As a practical matter, permitting deviations or deductions may eliminate the advantages to the first family, thus rendering the “first family first” policy meaningless.<sup>219</sup> Where parents have multiple subsequent children with different partners, providing accommodation to the subsequent children may result in low awards for all children.

Regardless of the method of accommodating subsequent children, several complications arise. One issue is whether both residential and nonresidential parents may consider subsequent children as a means to reduce a child support obligation for an existing child.<sup>220</sup> Several states allow only the nonresidential parent to claim “credit” for the subsequent children.<sup>221</sup> Allowing only nonresident parents to claim a deduction for subsequent children may have a disproportionate impact on mothers; most nonresident par-

---

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* § 3.04(a). Note that even the principle of first orders first is ripe for abuse. See *id.* at 3-47.

<sup>216</sup> *Id.* § 3.04(b), at 3-50 tbls.3, 4, 5 & 6 (noting that states treat the addition of children in more varied ways than they do in the presence of existing children); see also Reorich, *supra* note 189, at 972 (stating that although the federal government required all states to have guidelines, each state chooses which model to apply).

<sup>217</sup> See MORGAN, *supra* note 6, § 3.04(b) (listing which states use which methods); see also Venohr & Griffith, *supra* note 180, at 423-24 (listing which states use a self-support reserve).

<sup>218</sup> See, e.g., Marvin M. Moore, *The Significance of a Divorced Father's Remarriage in Adjudicating a Motion to Modify His Child Support Obligations*, 18 CAP. U. L. REV. 483, 483 (1989) (discussing motions to modify based on father's remarriage).

<sup>219</sup> The ALI Principles permit a parent's subsequent acquisition of child-related responsibilities to be treated as a deduction in some circumstances. ALI PRINCIPLES, *supra* note 6, § 3.16 cmt. b, illus. 1. This “hardship” exception offsets the first family priority by allowing for a deduction for “extraordinary health-care expenditure for that parent or a person to whom the parent has a legal or moral duty of support” or “the basic consumption needs of the parent's children who reside with the parent and for whom deduction has not already been taken.” *Id.* § 3.16.

<sup>220</sup> In percentage-of-income states, the income of the residential parent is not considered, so there is little basis for considering the subsequent children of the resident parent. In the income-shares states, the issue is whether the obligor and obligee are treated equitably with regard to being benefited or burdened by the role of subsequent children in support obligations. For a residential parent, the issue is whether or not the parent would receive an income deduction for the costs associated with subsequent children where they are not the obligor for the existing child or children.

<sup>221</sup> MORGAN, *supra* note 6, § 3.04(b) n.146 (listing Mississippi, New York, and South Carolina as states that consider the obligor's children only for deductions or deviations).

ents are fathers who receive the benefit of the deduction while mothers do not.<sup>222</sup> Other states provide that acquiring a new support duty may be used “defensively” — to defend a motion for an upward modification — but may not be used “offensively” — to seek a downward modification on the basis of having new children.<sup>223</sup> To calculate the amount of child support to be reduced, some states use the actual expenses of subsequent children,<sup>224</sup> while others craft a hypothetical child support order for the subsequent children.<sup>225</sup> Where parents are supporting multiple families, allowing numerous deductions may lead to child support orders that are unrealistically low for each of the families, particularly among low-income families.<sup>226</sup>

Another issue relevant under any model is the extent to which child support orders reflect new families’ resources.<sup>227</sup> States rarely consider the income of a new spouse or cohabitant because there is no legal duty of support to the existing children.<sup>228</sup> This rule may have a gendered effect where it is custodial mothers who would be more likely to benefit from including stepparent income.<sup>229</sup> Rationales underlying the exclusion of stepfamilies from parental rights and responsibilities are the preference for “the biological parent-child relationship as the exclusive model of family responsibility,” and the economic “unfairness” of extending obligations to non-biological family members.<sup>230</sup> The general rule disfavoring stepparent obligations may also be based on assumptions about how stepfamilies handle

<sup>222</sup> See *id.* § 1.03(c) (describing percentage of income models).

<sup>223</sup> Morgan, *supra* note 30, at 3–5 (explaining that one rationale for forbidding the offensive use is the assumption that the decision to have additional children should not be a vehicle to reduce prior obligations); see also MORGAN, *supra* note 6, § 3.04(b) n.136 (listing states that only permit “defensive” motions).

<sup>224</sup> MORGAN, *supra* note 6, § 3.04(b)(2).

<sup>225</sup> *Id.* Note that this can result in a substantial reduction. Another method, which has not been used in the United States, is to combine all children into a “total number” to devise a common order. See Thompson, *supra* note 5, at 248–53 (comparing the Canadian, English, and American approaches).

<sup>226</sup> For families on welfare, the issue of deviations and deductions is less salient because the welfare recipient receives a set amount of public benefits. For further discussion of issues arising from assignment of welfare recipients’ child support rights to the states, see *supra* note 143 and accompanying text.

<sup>227</sup> Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 *FORDHAM L. REV.* 539, 587 (1990) (describing alternative justifications for increasing or decreasing a child support order); see MAHONEY, *supra* note 30, at 44.

<sup>228</sup> Minow, *supra* note 7, at 316. Another approach, which has not been embraced by the American legal system, is to look at all of the people and resources that could provide support to a child and to prohibit downward modification if the first family is highly dependent upon the payor. *Id.* at 317; see also Clayton P. Kawski, *Stepping Income: Evaluating the Inherent Inconsistency of Illinois’s Trend Toward Consideration of New Spouse Income in Child Support Modification*, 27 *N. ILL. U. L. REV.* 247, 258–70 (2007) (examining the extent to which Illinois considers new spouse income). Generally speaking, the income of a parent’s current spouse or partner is not taken into account but may be imputed in limited circumstances. ALI PRINCIPLES, *supra* note 6, § 3.14 cmts. c, g.

<sup>229</sup> Morgan, *supra* note 30, at 1 (citing projections that one in three children will spend some time in a stepfamily and noting that a majority of stepparents are men).

<sup>230</sup> MAHONEY, *supra* note 30, at 14. Note that stepparents may assume rights and responsibilities regardless of the presence or absence of a biological parent. *Id.*

money and whether or not their resources should be or are merged.<sup>231</sup> If child support guidelines included the availability of a stepparent's income or a cohabitant's income, this inclusion would probably increase child support payment calculations for children living in multiple families.

At the poverty level, low-income families are in a double-bind regarding new partner income and child support. Welfare recipients who create new families are excluded from the rule disfavoring counting the income of new partners because of the relationship between state support laws and the definition of a dependent under welfare law.<sup>232</sup> Specifically, many children may be excluded from AFDC because welfare regulations may include a portion of a stepparent's income in calculating the child's need for welfare assistance.<sup>233</sup> Federal child support policy should therefore consider the availability of new spouse or cohabitant income for multiple families and provide guidance to states for how to account for this income in their guidelines.

### B. State Child Support Guidelines as Applied to Multiple Families

Consider the blended families described below.<sup>234</sup> Maryann is a thirty-four-year-old woman raising three children. Maryann made \$16,000 per year, but has been laid off. Maryann's oldest son is Jake, who is twelve, and her oldest daughter is Felicia, who is eight. Felicia and Jake's father is J.T. J.T., who is thirty-one, is a car mechanic making about \$19,000 annually. J.T. and Maryann have never lived together. J.T. visits Felicia, Jake, and Maryann periodically but he has never maintained a formal visitation schedule. Maryann invites J.T. to family events and he usually attends, bringing small presents for Felicia and Jake. When Jake was a baby, J.T. did not have a job, so he spent more time with Jake and Maryann. When Maryann asks, J.T. will babysit if he has time.

J.T. has two other children, Sam (age four) and Bettie (age two) with whom he does not live but informally supports. Their mother is Janette, who has no income. Maryann also has another child who lives with her, Beatrice, who is five. Beatrice's dad is Peter. Peter, who is twenty-nine, works for a shipping company and makes \$35,000 per year. Peter lives with Anna, a

---

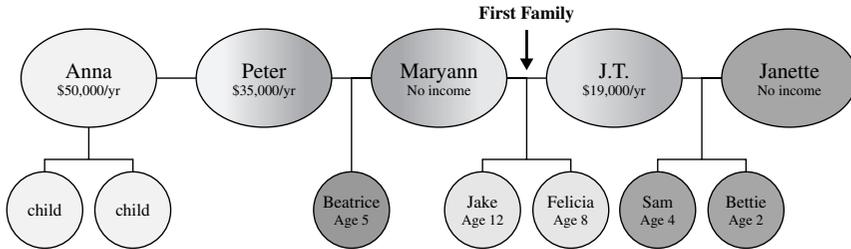
<sup>231</sup> Engel, *supra* note 16, at 317 (describing the ways in which stepfamilies may handle money, including one method where resources of the new families are merged and another where the stepfamilies keep their finances distinct and allocate based on biology).

<sup>232</sup> MAHONEY, *supra* note 30, at 48–51 (discussing the relationship between AFDC and stepparent support).

<sup>233</sup> *Id.* at 51. For example, in Pennsylvania, stepparent income may be taken into account when determining state support. See 62 PA. CONS. STAT. ANN. § 432.12(c) (1996).

<sup>234</sup> For the sake of simplicity, this hypothetical describes a limited complex family situation in which each existing parent has had subsequent children with only one other person. A truly complex multiple family might involve subsequent children with more parents. Additionally, this scenario is based on a heterosexual blended family in order to reflect a scenario that would require a duty of support in all states.

paralegal who makes \$50,000 annually. Anna has two children from a previous relationship. Maryann does not have any child support orders, and she currently receives approximately \$460 monthly in welfare assistance.<sup>235</sup> As a condition of accepting welfare, Maryann has assigned her rights to child support to the state. If her child support payments were more than welfare, presumably she would receive child support instead of welfare.<sup>236</sup> This tree represents the connections among the parents in this hypothetical:



There are several different outcomes, following one common income-shares child support guideline model, under which Maryann is entitled to support from both J.T. and Peter.<sup>237</sup> Looking first at support for Felicia and Jake, if Maryann obtained a child support order based on J.T.'s income before he had subsequent children, he would owe approximately \$546 monthly to Maryann for Felicia and Jake's support. However, if Maryann did not have a child support order in place for Felicia and Jake until after Sam and Bettie were born, there would be a question of how to "count" Sam and Bettie in making child support orders after their births.<sup>238</sup> If Sam and Bettie lived with J.T., he would receive an income deduction for them, and

<sup>235</sup> See D.C., DEP'T OF HUMAN SERVS., IMA POLICY MANUAL pt. VI, ch. 8.5, [http://dhs.dc.gov/dhs/cwp/view,a,1345,q,604418,dhsNav\\_GID,1728,asp](http://dhs.dc.gov/dhs/cwp/view,a,1345,q,604418,dhsNav_GID,1728,asp) (last visited Dec. 1, 2008) (using \$463 as a standard allowance for three children in one of the examples). Exhibit 4 lists the standard allowance as \$523. *Id.* The D.C. statutes do not include the amounts of TANF assistance, but do regulate the administration of TANF through the local agency. See D.C. CODE §§ 4-202.01-4-218.01 (2007).

<sup>236</sup> This example illustrates the limitations of child support policy for very poor families. For example, if J.T. or Peter had no income or made below their state's self-serve reserve, the issue of dividing limited resources among the families would not be significant because the welfare payment would be more than any proposed child support order.

<sup>237</sup> All subsequent numbers in this example are based on the D.C. CODE § 16-916.01 (2007) and the D.C. child support calculator, D.C. Office of the Att'y Gen., D.C. Child Support Calculator, <http://csgc.oag.dc.gov/application/main/intro.aspx> (last visited Nov. 21, 2008). Assume that Maryann has sole physical and legal custody of all of her children. None of the calculations that follow will account for child care costs, health care costs, or any unusual expenses. I chose Washington, D.C. because of my familiarity with the statute, because it was recently changed to account more specifically for subsequent children, because it is a fairly typical income-shares model, and because the D.C. government has provided an approved child support guideline calculator online.

<sup>238</sup> In practice, "first family first" often means the first family to obtain a child support order, not necessarily the first child by *birth*. In some instances, this may encourage a race to the courthouse to obtain a child support order. See MORGAN, *supra* note 7, § 3.04(a).

Felicia and Jake would only receive \$142 total monthly.<sup>239</sup> If Sam and Bettie did not live with J.T., he would only receive an income deduction for them if he was subject to a prior support order, and the amount of the existing prior child support order would be deducted from his income. In contrast, some states do not distinguish between a residential or nonresidential subsequent child. Under this model, Felicia and Jake would likely receive \$371.<sup>240</sup> This example shows the range of applications when subsequent children are considered as income deductions. This wide variety of outcomes demonstrates how closely linked child support is to welfare: for families who are close to the poverty line, even a small decrease in child support may push them into poverty and public assistance.

Assuming that Janette seeks child support from J.T., the following outcomes are possible. If Maryann had a prior child support order, under the standard “first family first” application, Janette would only be entitled to a minimum amount, which in D.C. is \$50,<sup>241</sup> given J.T.’s low income.<sup>242</sup> In states without a self-serve reserve, however, Sam and Bettie would be more likely to receive \$200–\$300.<sup>243</sup> It is important to note that the child support

---

<sup>239</sup> The award may be higher in some states. In Minnesota, an income-shares state, the award would be reduced to \$309. See Minn. Dep’t of Human Servs., Minn. Child Support Guidelines Calculator, <http://childsupportcalculator.dhs.state.mn.us/> (last visited Dec. 1, 2008). In a good example of the “first families first” application, if Sam and Bettie were living with their mother, and she applied for child support after Felicia and Jake had an existing order, Sam and Bettie would receive only \$110 (the obligation is \$205, but there is a self-serve reserve). Delaware also provides a deduction for new residential non-joint children. CHANDLEE J. KUHN, FAM. CT. OF THE STATE OF DEL., DEL. CHILD SUPPORT EVALUATION AND UPDATE 13–14 (2006), <http://courts.delaware.gov/how%20to/support/?childsupportguidelinesedv121106.pdf>.

<sup>240</sup> North Dakota, which follows a percentage-of-income guideline model, provides a deduction for subsequent children whether or not they reside with the obligor. N.D. ADMIN. CODE § 75-02-04.1-06.4 (2006). North Dakota has a “Multiple Families Child Support Schedule (Schedule C).” See N.D. State Court, N.D. Child Support Calculator, [www.ndcourts.com/chldsp](http://www.ndcourts.com/chldsp) (last visited Dec. 1, 2008). This schedule takes into account the number of other families, i.e., how many ways J.T.’s income needs to be allocated. *Id.* For example, if Sam and Bettie had two different mothers, the amount that Felicia and Jake would receive would be \$321. See *id.* The standard order that Felicia and Jake would have received in the absence of other children, in contrast, is \$441 monthly. See *id.* Although North Dakota follows a percentage-of-income guideline model, there is no significant difference between an income-shares or percentage-of-income guideline model in this hypothetical because Maryann has no income. In California, the result would change from \$518 to \$370. See Cal. Dep’t of Child Support Servs., California Guideline Child Support Calculator, <http://www.childsup.cahwnet.gov/Resources/CalculateChildSupport/tabid/114/Default.aspx> (last visited Dec. 1, 2008).

<sup>241</sup> D.C. CODE § 16-916.01(g)(3) (2008) (stating the presumption that any parent is able to contribute the minimum amount of \$50 per month).

<sup>242</sup> Venohr & Griffith, *supra* note 180, at 425–26. D.C. provides a self-support reserve, which is a set amount of income below which the parent’s income may not fall. In D.C., that income is \$12,382 annually. D.C. CODE § 16-916.01(g)(1) (2008).

<sup>243</sup> For example, the award was \$262 in New Hampshire (where the first award would have been \$454). N.H. Dep’t of Health and Human Servs., Child Support Calculator, <http://www.dhhs.state.nh.us/DHHS/DCSS/Child+Support+Calculator/default.htm> (last visited Dec. 1, 2008). Utah’s award was \$348 (where the first award would have been \$463), Utah State Cts., Online Court Assistance Program — Child Support Calculator,

calculations above cannot answer the questions of how J.T.'s income may be reallocated if either party moved to modify an existing child support order because of the birth of Sam and Bettie or other new circumstances.<sup>244</sup> In sum, the range of child support orders for Felicia, Jake, Sam, and Bettie could be as low as \$50 and as high as \$546.<sup>245</sup>

Based on his income, Peter would be obligated to pay approximately \$775 monthly to support Beatrice. However, this does not include Anna's income, Anna's two children that Peter has no duty to support, or the child support that Maryann receives on behalf of Felicia and Jake.<sup>246</sup> These figures demonstrate the difference in child support amounts provided to complex families under one limited application of a specific guideline model.

Although some state guidelines provide a mechanism to address family complexity, state approaches vary widely.<sup>247</sup> States handle multiple families

---

<http://www.utcourts.gov/childsupport/calculator> (last visited Dec. 1, 2008). The award was \$363 in South Carolina (where the first award would have been \$472). Child Support Enforcement, S.C. Dep't of Social Servs., Child Support Calculator, <http://www.state.sc.us/dss/csed/calculator.htm> (last visited Dec. 1, 2008). There may be even greater variance in states that calculate hypothetical orders. Hypothetical orders refer to the practice by which a judge calculates the support order for Child A assuming a certain amount would apply for Child B; this assumed amount for Child B, however, is not actually ordered or enforceable.

<sup>244</sup> Because most states handle subsequent children as a deviation or through modifications, this hypothetical is intended to provide only a limited example of the differences in outcome.

<sup>245</sup> The following chart shows the range of child support outcomes for Felicia, Jake, Sam, and Bettie:

	Maryann seeks child support from JT before J.T. has other children	Maryann seeks child support from J.T. after Sam and Bettie are born (where J.T. lives with Sam and Bettie)	Maryann seeks child support from J.T. after Sam and Bettie are born (where J.T. does not live with Sam and Bettie)	Janette seeks child support for Sam and Bettie after Maryann has an order for Felicia and Jake
Felicia and Jake (father is J.T.)	\$546/month (range is \$400-\$600)	\$142/month	\$370/month (taken from other states because there would not be a deduction in DC unless there was a prior order in place for Sam and Bettie)	\$546/month (without anyone moving to modify, it would remain the same)
Sam and Bettie (father is J.T.)	N/A	No order in place, assumes J.T. contributing	No order in place, assumes J.T. contributing	\$50 (range is \$200-300)

<sup>246</sup> If Anna's income and Peter's responsibility for the two non-biological children are both considered, Peter would owe Maryann closer to \$1000 monthly.

<sup>247</sup> BRITO, *supra* note 141, at 1, 15-20 (examining various state approaches). In 1996, the American Bar Association prepared a study for the OCSE evaluating the state guidelines. In this study, the ABA confirmed that there was considerable variation on how prior orders and subsequent obligations are handled. OFFICE OF CHILD SUPPORT EN-

with little specific attention other than as part of a deviation or an income deduction, as seen in the application to J.T. and Peter.<sup>248</sup> Even though states have managed to create ways to deal with child support for multiple families, the lack of cohesive policy on resource allocation in multiple families results in a lack of uniformity and variety of results.

Inconsistency can occur either between states or within states, and the inconsistency of results demonstrates the larger problem of inconsistent policy goals for multiple families. Frequent deviations may lead to low child support orders for existing families. When families move across state lines, inconsistency may mean uncertain and varying awards. Improving consistency may also lead to less litigation.<sup>249</sup> Through their state guideline committees, states have expressed interest in increased federal guidance on complex families.<sup>250</sup> Given federal involvement and investment in child support, states should not be forced to haphazardly handle child support for complex families. The federal government should state its goals for multiple families and should be clear that existing families should not be harmed by the birth of new children.

In the face of this federal silence, several states have created mechanisms or methods to respond to multiple families. A handful of examples illustrate this point. North Dakota has a specific provision for multiple family cases in which the court crafts a hypothetical order for all of the obligor's children whether or not all of the children are before the court.<sup>251</sup> New Jersey permits a court to review all past orders concerning the obligor.<sup>252</sup> Texas provides *two* methods for computing support for children in more than one household: one method allows for hypothetical awards, and the other applies a percentage to the obligor's net resources based upon the number of children in existence and the number of children before the court.<sup>253</sup> In the majority of the states that designate a process for multiple families, the provision applies only where the nonresident parent has a subsequent child that

---

FORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., EVALUATION OF CHILD SUPPORT GUIDELINES, vol. I, ch. 3, §§ 2.1.1–2.1.2 (1996), <http://www.acf.hhs.gov/programs/cse/pubs/1996/reports/gdl/index.html>.

<sup>248</sup> Disparities exist between models, particularly for low-income families. See Marianne Takas, *Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?* 26 FAM. L.Q. 171, 177–78 (1992) (demonstrating that neither income-shares nor percentage-of-income models avoid pushing a party into poverty in multiple families); see also Ellman, *supra* note 26, at 161 app. A (comparing outcomes of state guidelines).

<sup>249</sup> Cf. OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 247, vol. I, ch. 3, § 3.2.2 (noting that Delaware found that factoring in multiple orders led to litigation).

<sup>250</sup> See OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP'T OF HEALTH AND HUMAN SERVS., EVALUATION OF CHILD SUPPORT GUIDELINES, pt. 1 (1996), [www.acf.hhs.gov/programs/cse/pubs/1996/reports/gdl/v2pt1.htm](http://www.acf.hhs.gov/programs/cse/pubs/1996/reports/gdl/v2pt1.htm) (noting that “[t]he issue of multiple families was perhaps the most popular topic for the [state] guideline review committees”).

<sup>251</sup> N.D. Admin. Code § 75-02-04.1-06.1 (2003).

<sup>252</sup> N.J. STAT. ANN. app. 9-A (1995).

<sup>253</sup> TEX. FAM. CODE ANN. §§ 154.128–129 (1995).

lives with the parent.<sup>254</sup> Frequently, the parent is entitled to an income deduction based upon a percentage of what the child support order would be for the subsequent child.<sup>255</sup> Connecticut also has an expansive definition of income and, while not counting the income of new partners or spouses, allows for a deviation from a presumptive child support award if the new partner or spouse's contributions have led the parent to "experience[ ] an extraordinary reduction of his or her living expenses as a direct result of such contributions or gift."<sup>256</sup> In Montana, "if a person with a subsequent family has income from overtime or a second job, that income is presumed to be for the use of the subsequent family" and is not included as income to determine support for the prior family.<sup>257</sup> These examples demonstrate that states have taken a variety of approaches to handling multiples families, without explicit or uniform policy goals.

Some states account for the poverty of either the children or the obligor. In Kansas, the "multiple-family application" is discretionary if the child support amount ordered would be below the poverty level.<sup>258</sup> One consideration in the Hawaii guidelines is the need "[t]o balance the standard of living of both parents and child and avoid placing any below the poverty level whenever possible."<sup>259</sup> Other states are more concerned with the poverty of the obligor. Pennsylvania only permits a reduction for new children if the cumulative support awards exceed half the obligor's monthly net income.<sup>260</sup> Pennsylvania is explicit that "in no event should either a first or latter family receive preference" and allows a proportional reduction of child support ob-

---

<sup>254</sup> In this sense, the multiple family adjustment is meant to capture only the subset of parents who cohabit with the subsequent children. *See, e.g.*, KAN. STAT. ANN. § 23-9208 (2007). An exception is Montana, which allows a deduction at fifty percent of the child support award regardless of where the child lives. MONT. ADMIN. R. § 37.62.110 (2007) (allowing a deduction for "an amount equal to one-half of the primary child support allowance . . . for the number of other children for whom no support order exists. These include children who reside with the parent as well as children who do not.").

<sup>255</sup> In Indiana, the percentage changes depending on the number of children. IND. CODE ANN., Child Support Rules and Guidelines, Guideline 3 cmt. 3 (1989) (one child is 0.935%, two children 0.903%, three children 0.878%, and four children 0.863%). D.C. allows a parent to receive an income deduction for new children, but only for those children living with the parent and only seventy-five percent of the hypothetical child support obligation. D.C. CODE § 16-916.01(d)(5) (2008).

<sup>256</sup> CONN. AGENCIES REGS. § 46b-215a-3 (2005). The Connecticut guidelines were recently revised to require an income deduction for the needs of subsequent children and to eliminate the deviation; this deduction only applies in defending against a proposed modification. *Id.* § 46b-215(a)(f)(2)(E), pmb. California also allows the income of a new spouse or partner to be included in limited circumstances. CAL. FAM. CODE § 4057.5 (West 2008) (allowing income where excluding it would lead to extreme and severe hardship to any child subject to the child support award).

<sup>257</sup> MONT. ADMIN. R. § 37.62.106 (2007). In Montana, all children are considered when modifying awards for new children, and minor adjustments are preferred. *Id.* § 37.62.146(3).

<sup>258</sup> KAN. STAT. ANN. § 23-9208 (2007).

<sup>259</sup> HAW. CODE R. § 576D-7(a)(7) (2007).

<sup>260</sup> PA. R.C.P. 1910.16-7(a) (2008).

ligations when the obligor has multiple families.<sup>261</sup> By contrast, D.C. allows a downward deviation if, upon evaluating the standard of living of the custodial parent, it would be *higher* than that of the obligor because of child support received from a non-joint child.<sup>262</sup> This variety of state methods for handling multiple families demonstrates the inconsistent approaches to poverty in multiple families.

The issue of multiple families is frequently “underground” because it is handled at the distribution rather than the front-end of guideline implementation. A state child support enforcement agency may have an order of priority of how to distribute child support where there are multiple family orders.<sup>263</sup> Even less public, states may provide guidance to employers who receive multiple income-withholding orders.<sup>264</sup> The underground nature of the issue of multiple families absolves states of the obligation to be explicit about the policy choices that they are making in allocating resources among multiple families.

Child support policy should account for complex families in the child support goals and laws. Although neither federal child support laws nor goals have addressed how to handle existing and subsequent children, important policy questions should be answered. What is the outcome that we would like for families like those described above? What goals are we trying to meet? Which children would we like to raise above the poverty line? Should they all have the same standard of living? How do we decide? Should Felicia, Jake, and Beatrice receive the same amount? Should that amount be the same as Sam and Bettie’s? What if J.T.’s payments have the ability to raise one set of children, Felicia and Jake, out of poverty, but not the other set? How do we decide which family should receive more child support? Under the current regime, Anna’s income would not be legally significant, but should we look at Anna’s income in deciding Peter’s support obligation for Beatrice? Should Maryann or Beatrice benefit from Peter forming a union with someone who has financial resources? Should what Peter pays to Maryann have an effect on what J.T. pays to Maryann?<sup>265</sup> Lim-

---

<sup>261</sup> *Id.* 1910.16-7(b). In the sense that any reduction harms the first family, it is slightly disingenuous to say that there is no family preference. This statute is also noteworthy for its assumptions about new families, as PA. R.C.P. 1910.16-7(a) repeatedly mentions first marriage and remarriage.

<sup>262</sup> D.C. CODE § 16-916.01(p)(6) (2008).

<sup>263</sup> *See, e.g.*, KY. REV. STAT. ANN. § 405.467(6)–(7) (2007) (giving priority based on payoff hierarchy and using proportionality); OKLA. ADMIN. CODE § 340:25-5-351(f) (2008) (stating that the unit prorates and allocates collections to each family based on each family’s total current support due).

<sup>264</sup> This issue may arise when an employer receives several income-withholding orders, the total of which exceeds the percentage of income that can be withheld according to laws such as the Consumer Credit Protection Act, 15 U.S.C. § 1673(b)(2) (2000). Texas, for example, provides that in this situation, the withheld income should be divided equally among children. TEX. FAM. CODE ANN. § 158.207(b) (Vernon 2002).

<sup>265</sup> Other issues may be relevant to deciding the child support amounts owed by Peter and J.T. For example, we may want to know more about Peter or J.T.’s fathering (apart from financial obligations) or about the actual child-rearing expenditures for all of the

ited equalization seeks to fill the gap in the federal goals by providing guidance on these questions. By providing well-crafted child support goals that can be embodied in state guidelines, limited equalization affirms the necessity of examining complex families within the child support system, while favoring first families.

#### VI. FIVE NEW GOALS OF CHILD SUPPORT TO RECOGNIZE FAMILY COMPLEXITY

The federal government remains a primary way to provide financially for children, but any improvements must assume greater complexity than the current system. Complex families should not be pushed into the existing framework, as the complexity of the issues suggests hard choices and a lack of uniform solutions.<sup>266</sup> Child support policy should be restructured based on the realities of complex families, especially families living in poverty. The goals of child support should be: (1) to make an explicit policy choice about supporting multiple families in favor of existing families; (2) to recognize the demographics of the families that need child support; (3) to include an expanded definition of parenthood and the duty of support; (4) to increase poverty prevention; and (5) to increase attention to gender equality. In making an explicit policy choice in favor of existing families, limited equalization helps to answer the question of who bears the cost of subsequent families. These focal points provide guidance to the states in determining how to allocate resources among multiple families and provide guideposts by which to measure future revisions to child support guidelines.

In implementing a policy of limited equalization, there must be careful analysis of how parents with multiple children with different partners fare in the current child support system. Currently, state agencies are required to maintain records of applications for support, the location of noncustodial parents, actions to establish paternity and obtain and enforce support, the costs incurred in such actions, the amount and sources of support collections and the distribution of these collections fees charged or paid for support enforcement services, and any other administrative costs.<sup>267</sup> States are required to make reports each fiscal quarter on their collections and on their expenditures; however, although states are required to file extensive annual reports, there are no multiple family reporting requirements.<sup>268</sup> Federal regu-

---

families. We might also be concerned about incentives that are being created to form new unions or to have more children.

<sup>266</sup> See BRITO, *supra* note 141, at 1, 15–20 (discussing various state approaches to resolving the “competing tensions” inherent in addressing cases of complex families). But see Linda Ferguson, *Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligations*, 22 INT’L J.L. POL’Y & FAM. 61, 75–81 (2008) (describing child support decisions made under a Canadian federal support guideline).

<sup>267</sup> 45 C.F.R. § 302.15(a) (2008).

<sup>268</sup> See OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP’T OF HEALTH AND HUMAN SERVS., CHILD SUPPORT ENFORCEMENT COLLECTION REPORT (2007), available at <http://>

lations should require more data collection relevant to multiple families, and states should also analyze child support orders for multiple families. This data will ensure that any policy of limited equalization reflects the realities of those the child support system is meant to serve.<sup>269</sup>

*A. Limited Equalization Expresses a Policy Choice in Favor of Existing Families*

The first new child support goal makes an explicit choice about how to allocate resources in complex families. Limited equalization recognizes the need to provide adequate resources for all children without exacerbating the incentives for a nonresident parent to reduce payments to the first family. Child support is based on income, and there is frequently a limit to the number of children a parent's income can support. Blanket "equalization" thus means that the prior families bear the cost of a parent's subsequent families.

The cost of having subsequent families should be borne by parents without jeopardizing the living standards of the first family or existing families. First or existing children should receive a preference because nonresident fathers are less likely to pay child support when they have new children; there is empirical support for the idea that fathers "swap" families and may adjust their child support payments informally to account for new biological children.<sup>270</sup> This shift in resources decreases the standard of living of nonresident children and may leave them without sufficient resources.<sup>271</sup> Although some child support reductions should be allowed to account for the needs of subsequent children, any income deduction should only apply to child support orders for which they are in compliance.<sup>272</sup> Limited equaliza-

---

[www.acf.hhs.gov/programs/cse/forms/34A.pdf](http://www.acf.hhs.gov/programs/cse/forms/34A.pdf) (quarterly report on collections); OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP'T OF HEALTH AND HUMAN SERVS., CHILD SUPPORT ENFORCEMENT PROGRAM FINANCIAL REPORT (2007), available at <http://www.acf.hhs.gov/programs/cse/forms/396A.pdf> (quarterly report of expenditures); OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP'T OF HEALTH AND HUMAN SERVS., CHILD SUPPORT ENFORCEMENT ANNUAL DATA REPORT (2005) available at <http://www.acf.hhs.gov/programs/cse/forms/OMB-0970-0177.pdf> (annual reporting).

<sup>269</sup> I recognize that this is just one solution of many; there are many possible ways to address complex families in child support, and we should be eager to generate alternatives. One approach is to try limited equalization on an experimental basis in some states.

<sup>270</sup> Manning, Stewart & Smock, *supra* note 22, at 119 (suggesting that biological parenthood and coresidence are important factors in predicting whether fathers will "swap" families).

<sup>271</sup> See *id.* at 120; see also William S. Aquilino, *Impact of Family Structure on Parental Attitudes Toward the Economic Support of Adult Children Over the Transition to Adulthood*, 26 J. FAM. ISSUES 143, 161 (2005) (family structure has long-term effects on parents' willingness to provide financial assistance to their children); Susan D. Stewart, *Boundary Ambiguity in Stepfamilies*, 26 J. FAM. ISSUES 1002, 1024 (2005) (suggesting that nonresident children may be most hurt when parents take on additional parenting roles).

<sup>272</sup> It is also worth considering whether or not a new guideline should calculate the income for residential and non-residential parents differently, particularly where those categories so closely track gender. While at first blush, income-shares guidelines, in

tion looks at the actual needs and available support for all of the children rather than enforcing a blanket policy of either "equalization" or "first family first."

Limited equalization may be more in keeping with what courts actually *do* in multiple families; the "first family first" preference is often rendered meaningless by deviations and deductions. An ABA study in 1996 revealed the frequent use of downward deviations; a second household was a common reason given for deviations.<sup>273</sup> However, the amount of deviation varies from state to state. For example, the range of average downward deviation in the study was between \$48 to \$232 per month for subsequent obligations and from \$17 to \$185 per month for prior orders.<sup>274</sup> In another review of five states with different guideline models, the amount ordered for the subsequent child was always smaller than for the first, but the percentage by which it was smaller ranged from eight to twenty-five percent.<sup>275</sup> The frequent use of deviations often results in inconsistent and disproportionately low awards for the existing family or families, particularly where a nonresident parent resides with subsequent children. Deviations and adjustments to child support should not be used to undermine parental obligations as a consequence of incurring new responsibilities.

Returning to our previous example of the blended families, we should examine the hardships that would be caused to all the families in allocating the parents' limited resources to Felicia, Jake, Sam, and Bettie. As demonstrated in the hypothetical child support calculations, subsequent families ordinarily receive less child support, but only if one assumes that the first family has an existing child support order and that the obligor does not reside with the subsequent family or families. This result embodies the policy of "first family first." Where the obligor resides with a subsequent family, however, the first family's award is ordinarily significantly reduced. If Felicia and Jake were accustomed to receiving \$550 monthly from J.T., they would experience a significant hardship if their award were reduced by half. On the other hand, if Sam and Bettie are not living with J.T., and their mother, Janette, seeks support, they may suffer a hardship if they only receive the standard minimum of \$50, or a similarly low award.<sup>276</sup> In allocating J.T.'s income, the hardships facing each family should be accounted for, with an eye toward preserving the status quo for the existing family.

---

which both residential and non-residential parents' incomes are considered, seem "fair," we should research the harms to residential parents of this approach, particularly where most residential parents are mothers.

<sup>273</sup> See OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 247, vol. I, ch. 2, § 3 & tbls. 2, 3 & 4 (second household is the most common reason for deviations after agreement between the parties).

<sup>274</sup> *Id.* ch. 3, § 2.3.1.

<sup>275</sup> CASPAR, *supra* note 15, at 12 (examining several different guideline models, including percentage-of-obligor, income-shares, and Melson formula).

<sup>276</sup> There may be a difference between an award being lowered (i.e., re-allocation) and a low award being instituted.

States may develop numerous mechanisms to weigh the hardships to multiple families. After analyzing these hardships, one method of allocation is to provide a percentage of income to each child or each family.<sup>277</sup> In limited equalization, this percentage of income could be based on the actual need of the children and other available resources, or the number and sequencing of children (where existing children are given a preference). To maintain support for first or existing families, existing children should be entitled to a higher baseline percentage. Alternatively, there could be a baseline percentage of income under which the award for preexisting families could not fall. Once the baseline for the preexisting family is met, the family, or families, with the most need would receive a higher percentage of the obligor's income. Moreover, guidelines may include a preference for minor adjustments to existing child support awards so that families will not face drastic changes in their child support awards.<sup>278</sup> One reason to give a preference to existing children is that the hardships caused by a significant child support reduction, and the resulting decrease in standard of living, are more severe than those of having a low initial child support amount ordered.

Limited equalization as a policy goal attempts to protect existing children from bearing the brunt of new family formation. Because first or existing families are more likely to receive a child support reduction, particularly where the subsequent children live with the parent, we should tip the scales in favor of the first family or existing family.<sup>279</sup> At the same time, in looking to the available resources for children in multiple families, limited equalization allows courts to examine the actual living situation of the children and strive to keep all children out of poverty.

*B. Child Support Models and Guidelines Should Be Based on Accurate Assessments of Family Demographics and the Experiences of Complex Families*

The second new goal of child support is to serve the families reflected in the actual demographics of family composition. Recognizing family complexity may include, for example, assisting children without preference to whether or not their parents cohabitated. Relatedly, child support should not

---

<sup>277</sup> Some states already follow this approach, generally based on the number of children. Texas provides a percentage of income. See TEX. FAM. CODE ANN. § 154.128 (1995). Delaware provides a complicated percentage system designed to give preference to the needs of the first family. See KUHN, *supra* note 239, at 13.

<sup>278</sup> See, e.g., MONT. ADMIN. R. § 37.62.146 (2007). When modifying an existing order, the support obligation is calculated first considering all children and then considering no subsequent children. *Id.* If both calculations result in an increase or decrease in the award, the smaller of the two calculations is granted. *Id.* If one calculation results in an increase and the other in a decrease, then no modification is granted. *Id.*

<sup>279</sup> One possibility is to provide less of a deduction for subsequent children who live with the obligor.

aim to offset the cost of family dissolution because many families subject to child support orders have not cohabitated.<sup>280</sup>

Rather than basing child support on the economic model of a nuclear dissolving family, economic models should be based on more realistic assessments of families requiring child support. Because states are already required to provide economic analysis in support of their guidelines, this is a relatively easy structural change to make. The guidelines implementing limited equalization should simply have more components, require more information from the parents about their living situation, dependents, and resources, and require the state to weigh this information in setting support orders.<sup>281</sup> Admittedly, these new guidelines would be more complex than existing guidelines, and would require the state to weigh all such information in setting support amounts. This complexity, however, is a natural and necessary result of addressing the needs of complex families.

*C. Child Support Should Include an Expanded View of Whose Resources "Count"*

The third new child support goal is that laws should reflect an expanded definition of parenting and the duty of support. Until all family laws reflect the reality of parenting and formally expand parenting definitions, child support laws should consider more of the resources available to the family, even where there is not a legal duty of support.<sup>282</sup> As long as a parent has the means to provide child support, guidelines should examine ways for that support to be "counted" in a guideline calculation. For example, a new guideline should include an expansive definition of "income," which should include the resources available from other cohabitants, parents, and new partners.<sup>283</sup> Examining available resources requires obtaining information

---

<sup>280</sup> The concept of offsetting sounds worthy — we should make sure that children do not bear the brunt of establishing a second home when a household divides. Even for dividing families, however, this goal is empty rhetoric because the guidelines do not focus on equalization of standards of living and are purely based on the parents' income rather than living expenses or the cost of setting up several households.

<sup>281</sup> For example, the standard guideline program often asks only for the number of dependents, while a new guideline may want to know more about the dependents and other resources to which they have access.

<sup>282</sup> The definitions of parenting for custodial purposes do not need to match the definition of parenting for child support purposes. *See, e.g.*, Minow, *supra* note 7, at 320–22 (advocating the opposite: a tolerant approach to the benefits and a strict approach to the obligations that accompany family membership).

<sup>283</sup> Income should include the following: salary, wages, overtime, commissions, bonuses, royalties, dividend income, pension income, interest income, trust income, annuity income, Social Security benefits, workers compensation income, unemployment insurance benefits, disability insurance benefits, veterans benefits, capital gains, income from interest in an estate or life insurance, alimony or maintenance, lottery or gambling winnings, prizes or awards, rental income, earned income tax credits, monetary gifts, income from self-employment, military base, and special pay. This list combines the income required in the Maryland, Massachusetts, and Hawaii guidelines. MORGAN, *supra* note 6, at B-75 to -76, C-8 to -9, C-23.

about all of the resources, including income, of other adults in the home. Accomplishing this goal would also require thoughtful attention to how courts obtain and evaluate the information necessary to make decisions, as well as to how frequently to review or revisit child support determinations. Accomplishing this goal would likely require more reliance on judicial discretion, which in turn requires high levels of oversight to ensure judicial accountability.<sup>284</sup>

States should experiment with different methods of determining whose resources should be included in child support guidelines and how far the vision of the family should be expanded. For example, states may include the contributions of grandparents, family friends, or caregivers, and the resources of new intimate partners, whether or not they live with the children.<sup>285</sup> Considering the full range of resources available to parents and children may be particularly relevant to and helpful for children living in or near poverty. This expanded vision of resources should also be relevant in the hardship and poverty analysis.

Based on the sample hypothetical family, a new guideline might include a mechanism for examining who is providing for Sam and Bettie and for Felicia and Jake, regardless of whether or not there is a legal duty of support. Considering the living circumstances of and income available to each party and to each of the parties' partners acknowledges the interrelatedness of the lives of multiple families. For example, if Peter paid the \$775 monthly that he owed for the support of Beatrice to Maryann, Maryann may not need the full amount that she would ordinarily receive from J.T. to keep all three of her children out of poverty. In this scenario, J.T. could thus more equally allocate his income among his four children. Likewise, if J.T. were being supported by others or benefiting from someone else's income, he may not need all of his self-serve reserve and thus might be able to allocate more of his income to his children. If Maryann had access to additional resources, these would also be factored into the child support guideline calculation, as would Anna's income. Examining the actual resources available to the parents would allow for a more realistic assessment of the children's needs and would provide more flexibility in determining individual awards.

---

<sup>284</sup> There is a tension between rules (via guidelines) and judicial discretion. One of the original justifications for guidelines was that judicial discretion led to inconsistent and unfair results that frequently favored non-residential fathers. At the same time, the state guideline commissions that develop and review guidelines are often composed of private bar attorneys whose interests may not be aligned with poor families. I thank Daniel Hatcher for reminding me of this tension, which highlights the need for proactive change on behalf of multiple families and families living in poverty.

<sup>285</sup> Both California and Connecticut have limited provisions for considering new partner income. See sources cited *supra* note 256. States may wish to experiment with whether to count third parties' actual contribution or available resources.

*D. Child Support Should Seek to Prevent and Alleviate Poverty*

The fourth goal of a new child support policy should be to improve the financial situation of children and alleviate poverty. Because child support has been offered as a solution to welfare dependency, child support policy should explicitly seek to prevent poverty where welfare fails to alleviate poverty. This goal also extends to those families that are on welfare, because leaving welfare is not synonymous with leaving poverty.<sup>286</sup> As part of this focus, child support policy-makers should recognize that family dissolution is not the only cause of children's poverty.<sup>287</sup> Child support is unlikely to lift the poorest families out of poverty, particularly where nonresident parents lack the ability to pay;<sup>288</sup> however, there is some evidence that child support can alleviate poverty, even if it may need to be combined with other sources.<sup>289</sup> Limited equalization seeks to expand the income available to poor families in order to provide a wider safety net than currently provided by child support or welfare policies. Specific attention to poverty prevention may result in increased child support awards that could raise some families out of poverty without increasing the financial hardships to individual parents.<sup>290</sup>

Child support guidelines should be developed with the most financially needy families in mind. The federal government should reconsider how to use the resources of the OCSE and state agencies, since strong child support enforcement does not generally assist low-income families.<sup>291</sup> As part of this goal, the federal government should also reconsider the link between welfare law and child support law. At a minimum, child support laws should not be used to punish poor mothers or to enforce a pro-marriage agenda as a

---

<sup>286</sup> Daniel Meyer & Marcia Cancian, *Economic Well-Being Following an Exit from Aid to Families with Dependent Children*, 60 J. MARRIAGE & FAM. 479, 491 (1998) ("Welfare reforms targeted to reduce caseloads may do relatively little to enhance broader measures of economic success.").

<sup>287</sup> See Garrison, *supra* note 162, at 159 (guidelines fail to avert poverty because they were not designed with this goal in mind).

<sup>288</sup> See Daniel Meyer & Judi Bartfeld, *Compliance with Child Support Orders in Divorce Cases*, 58 J. MARRIAGE & FAM. 201, 210 (1996) (finding that greater ability to pay is associated with higher compliance, and a "burden of the orders" is not related to compliance until more than thirty-five percent of the income is owed). According to one small sample study, only three percent of obligors had the ability to pay but willfully failed to do so. SORENSON, SOUSA & SCHANER, *supra* note 23, at 5.

<sup>289</sup> See Daniel R. Meyer & Mei-Chen Hu, *A Note on the Antipoverty Effectiveness of Child Support Among Mother-Only Families*, 34 J. HUM. RESOURCES 225, 230 (1999) (finding that child support only brought six to seven percent of mothers above the poverty line in a 1995 population survey).

<sup>290</sup> This does not mean that there will be higher orders across the board. In conjunction with the third goal of expanding financial responsibility for children, attention to poverty prevention may require shifting resources and imposing child support obligations on more people.

<sup>291</sup> See *supra* Part IV.A.

method of alleviating poverty.<sup>292</sup> Additionally, the federal government should make adjustments, such as increasing the state pass-through for welfare recipients, to increase the perceived legitimacy of the child support system.<sup>293</sup>

One question is whether new child support guidelines should treat high- and low-income families differently.<sup>294</sup> Typically there is a certain income level above which the guidelines no longer apply.<sup>295</sup> This standard may be worth continuing as long as the new goals of child support are met. If the child support model is truly geared to complex low- and middle-income families, there may be reasons for the guidelines not to apply presumptively in high-income cases.<sup>296</sup> Although limited equalization could include a self-serve reserve for low-income families, the actual expenses and support system of the obligor should be relevant.<sup>297</sup>

As part of poverty prevention for multiple families, child support goals should focus on children. Current child support law typically focuses on parental equality, opportunity, and standards of living, rather than on the experience and needs of children.<sup>298</sup> Some state guidelines are concerned

---

<sup>292</sup> Disassociating welfare from child support is one way to escape some of the stereotypes about women that are promoted and exacerbated by our current child support regime. Proposing an overhaul of the welfare system is outside the scope of this Article.

<sup>293</sup> See WALLER, *supra* note 139, at 140–41. Waller also recommends supplementing child support payments with public funds, guaranteeing a publicly funded minimum, and helping noncustodial fathers find employment. *Id.* at 141–43.

Because of assignment rules, the government has claim to any unpaid support while a parent receives welfare benefits. See sources cited *supra* note 64. Once the government has collected this money, a small amount “passes through” to the parent; a state pass-through is the money the state turns over to the parent receiving public benefits. See Turetsky, *supra* note 59, at 408; Hatcher, *supra* note 122, at 1053.

<sup>294</sup> Some state guidelines have different policies and practices for high-income and low-income cases. See, e.g., Kathleen A. Hogan, *Child Support in High Income Cases*, 17 J. AM. ACAD. MATRIMONIAL LAW. 349, 358 (2001) (discussing trusts and other mechanisms in high-income cases); Rosettenstein, *supra* note 151, at 959 (discussing stock options in high-income families and their relation to child support). Although there may be a persuasive rationale for treating low- and high-income families differently, “[i]t would give a sorry moral statement if one’s parental duties evaporated if one only descended to a low enough income bracket.” Minow, *supra* note 7, at 309.

<sup>295</sup> See MORGAN, *supra* note 6, § 4.07(b) (explaining how courts handle high-income cases).

<sup>296</sup> Moreover, if one parent has high resources, the ability to support multiple children may be less of an issue. This premise, however, assumes compliance and high awards for all children of high-income parents.

<sup>297</sup> There is a wide range of self-serve reserves, ranging from a few hundred dollars to over \$1000 per month. MORGAN, *supra* note 6, at B-190 (Supp. 2004).

<sup>298</sup> The focus on parents is embodied in the Advisory Panel on Child Support Guidelines. See WILLIAMS, *supra* note 109, pt. I, at 4–5 (cited in MORGAN, *supra* note 6, § 1.02(e) (2003 Supp.), and in ALI PRINCIPLES, *supra* note 6, § 3.04(1)–(5)). Both of these sources state several policy goals concerning parents’ relationships to each other. As an example, section 3.04(1)(b) of the ALI PRINCIPLES refers to “impoverishing” parents, but not children, which reflects a concern between parents, rather than between children. ALI PRINCIPLES, *supra* note 6, § 3.04(b).

with “fairness” to the obligor over the needs of children.<sup>299</sup> Research indicates, however, that “few fathers fall below the poverty line because of the amount of support they are ordered to pay or the amount they actually pay.”<sup>300</sup> As part of the goal of alleviating poverty, child support should focus on the needs of the children, rather than their parents, and be framed around the experience of low-income families. This effort could include establishing an adequacy threshold for awards, articulating factors relevant to the minimum support amount, and outlining factors relevant to allocating resources above the baseline.

Looking at the previous example, a new child support guideline implementing poverty prevention would make allocations in light of how much support each family requires to remain out of poverty. If Felicia and Jake would be pushed (further) into poverty by reducing their child support award in half, the smallest possible reduction should be made to their award. Where J.T. resides with Sam and Bettie’s mother, Janette, and has access to more resources, the poverty reduction analysis may favor Felicia and Jake.

Where all non-residential families are poor, and possibly receiving public benefits, the allocation question is more challenging. It seems unfair for Sam and Bettie’s award to be significantly lower than Felicia and Jake’s, especially where Sam and Bettie’s award, at \$50, is far below the poverty line. It may seem equally unproductive, however, to reduce the award for Felicia and Jake if, as a result, the awards for Felicia, Jake, Sam, and Bettie would not keep *either* family out of poverty. Full equalization in non-resident families — which would mean splitting J.T.’s available income in half — would provide only \$275 per family, which is probably insufficient to keep either family out of poverty. Thus, under full equalization, both families would likely qualify for welfare. Where there are not enough resources for all families — even with an expanded view of whose resources count — limited equalization gives a preference to existing families so that existing children will not experience a significant decrease in their standard of living. Nonetheless, limited equalization should attempt to keep all families out of poverty by balancing their needs with their available resources.

---

<sup>299</sup> See MORGAN, *supra* note 6, § 3.04 (1)(b); see also D.C. CODE § 16-916.01(p)(6) (2008) (permitting a lower child support award if the recipient’s standard of living would be higher than the parent with the duty of support); Katherine Shaw Spaht, *The Two “ICS” of the 2001 Louisiana Child Support Guidelines: Economics and Politics*, 62 LA. L. REV. 709, 732 (2002) (discussing testimony about guideline revisions which focused on fairness to the obligor).

<sup>300</sup> Marcia Cancian & Daniel Meyer, *Fathers of Children Receiving Welfare: Can They Provide More Child Support?*, 78 SOC. SERV. REV. 179, 182–83 (2004) (citing research literature about fathers’ poverty and suggesting that their income needs to be increased).

*E. Child Support Should Advance Gender Equality*

The final goal of child support should be to foster gender equality. Gender equality is important in child support because, as part of family law and policy, child support laws are part of the legal tradition of discriminating against women.<sup>301</sup> There are numerous ways to examine gender in the child support system, including focusing on gender equality in the application of child support guidelines and in judicial decision-making, minimizing the ways in which women are forced into dependency, and limiting stereotypes based on gender. Each of these prisms provides a way for child support policy to be more attentive to gender.

States may wish to try different methods in order to achieve some of these objectives. One approach is to encourage child support laws to minimize gender roles, and to develop and monitor child support laws so that they are non-discriminatory in effect. A child support policy that examines gender should also ensure that children of mothers with multiple families are not treated less preferentially than children of fathers with multiple families. Additionally, a child support policy should not inadvertently perpetuate false assumptions about multiple parents and partners.<sup>302</sup>

Although child support laws are likely to remain gender-neutral, gender neutrality may obscure the reality that women typically receive child support and that “the child support regime is . . . based on gendered ideas of family life.”<sup>303</sup> While being mindful of not reinforcing stereotypes, federal and state governments should examine how child support laws and policies affect obligors and obligees differently. The current gender-neutral regime often masks the important ways that mothers are treated differently than nonresident fathers. For example, in some states, obligors may receive a deduction for subsequent children, but obligees do not receive a deduction for their subsequent children.<sup>304</sup> In effect, this different treatment allows obligors to receive an offset for having new children while the non-obligor receives no comparable benefit. Because fathers comprise the majority of obligors, they receive preferential treatment. Even as child support laws are

---

<sup>301</sup> See generally Katherine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475 (1999) (describing the insights feminism has brought to family law, including contesting privacy and neutrality).

<sup>302</sup> It may help to gather data on the frequency of multiple partners vis-à-vis mothers and fathers. The standard paradigm assumes a father who leaves a “first family” and has children with another woman, but empirical data could confirm or undermine this perception. The federal government should also examine child support payments for a correlation between support payments and the gender of the children.

<sup>303</sup> JOSEPHSON, *supra* note 18, at 143–44. As Susan Moller Okin has noted in discussing gender neutrality historically, “gender-neutral terms frequently obscure the fact that so much of the real experience of ‘persons,’ so long as they live in gender-structured societies, *does* in fact depend on what sex they are.” SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 11 (1989).

<sup>304</sup> See discussion *supra* Part V.A.

based on outdated assumptions about the roles of women, the gendered reality of who receives child support suggests that gender cannot be ignored.

Gender equality as a component of limited equalization might suggest examining the burdens or obligations of J.T. and Peter as compared to Maryann to make sure that Maryann is not being punished for her life choices. For example, if Maryann receives public benefits, she may face punitive or restrictive policies that J.T. does not experience. For instance, Maryann may face family cap policies as a consequence of having additional children, but J.T. would not experience any consequences as a result of his decision to have more children. Similarly, if the child support awards are so low that Maryann alone is responsible for making ends meet, she is forced into the sacrificing role of mother and low-wage worker. As part of striving for gender equity, child support laws and policies should not force Maryann to bear a disproportionate share of child-rearing responsibilities. Accordingly, a limited equalization approach advocates examining the effects of child support guidelines as applied to Maryann, J.T., and Peter to ensure that all parents share in the burdens of having subsequent families.<sup>305</sup>

Attention to gender equality is especially important in developing child support policy for multiple families. Because child support is a key component of family law policy, gender equality is an important goal for child support. Any of the frameworks described above for examining gender would likely improve child support policy. In looking at the reality of multiple families, limited equalization provides an opportunity to focus on the role that gender plays in child support.

\* \* \*

These five goals provide a foundation for a new child support policy that is centered on the lives of multiple families and families living in poverty, and aims to actually meet the needs of children. Implementing a new child support policy based on these five focal points provides an opportunity for states to experiment with how best to achieve these goals. As part of its involvement in regulating state child support guidelines, the federal government should evaluate those guidelines to ascertain whether or not the five new child support goals are being accomplished. Developing a method to account for multiple families, especially low-income families, is crucial, but all families — not just low-income or complex families — would benefit from a new child support guideline with the above-stated goals.<sup>306</sup>

---

<sup>305</sup> For example, if J.T. receives an income deduction for his subsequent children, Maryann should also receive credit for her subsequent children.

<sup>306</sup> Some states have enacted a multiple families guideline, which may be more politically feasible than writing new guidelines for all families.

## CONCLUSION

Current child support goals and laws assume a model of the family that is inaccurate and fails to account for family complexity. As a result, the goals of federal child support — fiscal savings, economic well-being, and parental involvement — are unrealistic and unattainable. Reviewing the failures of the federal child support goals and laws demonstrates the problems with the current child support regime as applied to all families; the multiple family lens highlights the need for changes across the board. These failed and flawed goals should be replaced with goals that reflect the needs of families today: an explicit policy decision about supporting multiple families in favor of existing families; recognition of the demographics of the families that need child support; an expanded definition of parenting and the duty of support; increased attention to poverty prevention; and an increased focus on gender equality. Particularly in light of welfare's failures, new child support guidelines should be developed to favor existing families while allocating resources across families more equitably. This new theory of limited equalization requires states to examine the resources available for all of the families, examine the hardships that would be caused to the families by reallocation, and attempt to keep all families out of poverty.

